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**In the Supreme Court of the United States**

OCTOBER TERM, 1982

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UNITED STATES OF AMERICA, PETITIONER

v.

WEBER AIRCRAFT CORPORATION, ET AL.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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### **QUESTION PRESENTED**

Whether confidential statements made by witnesses in an Air Force air crash safety investigation are protected from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

### **PARTIES TO THE PROCEEDING**

The respondents are Weber Aircraft Corporation and Mills Manufacturing Corporation.



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## **PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### **OPINIONS BELOW**

The opinion of the court of appeals (App. A, *infra*, 1a-19a) is reported at 688 F.2d 638. The district court's findings of fact and conclusions of law (App. B, *infra*, 21a-26a) are not reported.

### **JURISDICTION**

The judgment of the court of appeals (App. A, *infra*, 18a) was entered on September 21, 1982, and a petition for rehearing was denied on December 3,

1982 (App. D, *infra*, 29a). On February 23, 1983, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including April 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATUTE INVOLVED

1. The Freedom of Information Act, 5 U.S.C. 552(a)(4)(B), provides:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

2. The Freedom of Information Act, 5 U.S.C. 552(b)(5), provides:

(b) This section does not apply to matters that are—

\* \* \* \* \*

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

## STATEMENT

1. Whenever an Air Force plane crashes, two investigations are routinely conducted. One of these, the "collateral investigation," is designed to gather and preserve evidence for use in official, on-the-record proceedings, such as courts-martial, administrative proceedings, and civil litigation. See A.F. Reg. 110-14 (July 18, 1977).<sup>1</sup> The other investigation, termed a "safety investigation," is an internal probe the sole purpose of which is "to prevent mishap recurrence." A.F. Reg. 127-4 ¶ 2-4 (Jan. 18, 1980).<sup>2</sup> In order to assure that the latter investigation uncovers as much evidence as possible, witnesses are promised that their statements will not be divulged to anyone for a purpose other than safety. A.F. Reg. 127-4 ¶ 2-5 (Jan. 18, 1980).<sup>3</sup> The Air Force credits this program with significant results in improving aircraft safety. The other military services follow similar procedures.

To protect the integrity of this vital program, the courts have recognized a civil discovery privilege for confidential witness statements made in connection with military safety investigations. See *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963).<sup>4</sup> Similarly, two courts of appeals

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<sup>1</sup> The collateral investigation in this case was conducted pursuant to A.F. Reg. 110-14 (Nov. 1, 1973). App. A, *infra*, 2a n.2.

<sup>2</sup> The safety investigation in this case was conducted pursuant to A.F. Reg. 127-4 (Jan. 1, 1973), pertinent provisions of which are set forth at App. E, *infra*, 31a-33a. The regulation adopted in 1980 did not change the privilege or procedures involved here in any material respect.

<sup>3</sup> See also A.F. Reg. 127-4 ¶ 19(a) (3) (Jan. 1, 1973) (superseded 1980).

<sup>4</sup> See also *McCormick on Evidence* § 108, at 230 n.6 (E. Cleary 2d ed. 1972); 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2019, at 169 n.22 (1970).

have held that such statements are exempt from disclosure under Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b) (5), which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." See *Cooper v. Department of the Navy*, 558 F.2d 274 (5th Cir. 1977), modified on other grounds, 594 F.2d 484 (5th Cir.), cert. denied, 444 U.S. 926 (1979); *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975).

2. In the accident giving rise to the documents at issue in this litigation, an Air Force pilot, Captain Richard Hoover, suffered serious injuries when he ejected from his plane after an engine failure. Pursuant to its regulations, the Air Force conducted both a "collateral investigation" and a "safety investigation." When Captain Hoover brought suit in federal court for damages against the manufacturers of his plane's ejection equipment,<sup>5</sup> two of the defendant companies, respondents Weber Aircraft Corporation and Mills Manufacturing Corporation, sought discovery of the Air Force investigation reports pertaining to the accident. The Air Force released the complete record of the collateral investigation and portions of the safety investigation report. However, relying upon the privilege recognized in *Machin*, the Air Force declined to release confidential statements made in connection with the safety investigation by Captain Hoover and by an airman who helped to rig the ejection equipment. App. A, *infra*, 2a-3a.

Respondents then filed Freedom of Information Act requests seeking disclosure of the confidential state-

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<sup>5</sup> *Hoover v. Weber Aircraft Corp.*, C.D. Cal. No. CV 74-1064-WPG.

ments, but the Air Force refused to release the records in reliance on Exemption 5. After exhausting administrative remedies, respondents brought this action in the United States District Court for the Central District of California. App. A, *infra*, 3a-4a. In an uncontroverted affidavit filed in district court, the Air Force pointed out that the effectiveness of its safety investigation program

depends to a large extent upon [its] ability to obtain full and candid information on the cause of each aircraft accident. \* \* \* Open and candid testimony is received because witnesses are promised that for the particular investigation their testimony will be used solely for the purpose of flight safety and will not be disclosed outside of the Air Force. Lacking authority to subpoena witnesses, accident investigators must rely on such assurances in order to obtain full and frank discussion concerning all the circumstances surrounding an accident.

R.E. 42-43, Affidavit of Maj. Gen. Len C. Russell, Commander, Air Force Inspection and Safety Center at 2-3.\* The Air Force also averred that the inability of safety investigators to make enforceable promises of confidentiality "would seriously hinder the accomplishment of prompt corrective action designed to preclude the occurrence of a similar accident" and that the privilege against forced disclosure of witness statements is therefore "the very foundation of a successful Air Force flight safety program" (*ibid.*). The Secretary of the Air Force concluded that public release of witness statements "would effectively dry up a vital source of information because the promise of

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\* "R.E." refers to the Record Excerpts filed with the court of appeals.



confidentiality would no longer be enforceable." R.E. 58, Affidavit and Claim of Privilege by Thomas C. Reed, Secretary of the Air Force ¶ 17.

The district court held that the witness statements had been properly withheld under Exemption 5 (App. B, *infra*, 21a-26a; App. C, *infra*, 27a), but a divided panel of the court of appeals reversed, holding that Exemption 5 does not incorporate the *Machin* civil discovery privilege (App. A, *infra*, 1a-19a). The court based its decision upon *FOMC v. Merrill*, 443 U.S. 340 (1979), in which this Court held that Exemption 5 incorporates a limited privilege for confidential commercial information. The court of appeals acknowledged (App. A, *infra*, 8a n.6), however, that "*Merrill* expressly left open the question whether Exemption 5 incorporates [the *Machin*] privilege."

The court of appeals noted (App. A, *infra*, 6a) the statement in *Merrill* (443 U.S. at 355) that a claim that Exemption 5 incorporates a privilege other than those specifically recognized in the legislative history "must be viewed with caution." Observing that the *Merrill* Court had found evidence in the legislative history that Congress "specifically contemplated a limited privilege for confidential commercial information" (*id.* at 359), the court of appeals stated (App. A, *infra*, 6a; emphasis added): "As we read *Merrill*, this finding is the linchpin of the Court's analysis: *Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history.*"

Assuming "that the witness statements here would be shielded from civil discovery under the *Machin*

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<sup>7</sup> The Court stated in *Merrill* (443 U.S. at 355 & n.15) that the deliberative process, attorney-client and work-product privileges were "expressly mentioned" in the legislative history.

privilege" (App. A, *infra*, 8a), the court of appeals then reviewed the legislative history of the FOIA but found "no evidence \* \* \* that Congress intended Exemption 5 to protect witness statements given under a promise of confidentiality" (*id.* at 10a). The court instead concluded (*id.* at 11a-12a) that Congress intended to protect only legal or policy matters and the exchange of ideas among agency personnel, rather than purely factual material.

The court of appeals acknowledged (App. A, *infra*, 7a-8a) that its decision conflicts with decisions of the Fifth and Eighth Circuits handed down prior to *Merrill. Cooper v. Department of the Navy, supra*; *Brockway v. Department of the Air Force, supra*. However, the court disagreed (App. A, *infra*, 9a) with the Eighth Circuit's interpretation of the legislative history of Exemption 5. Expressing skepticism concerning the government's assertion that "future aircraft accident investigations will be seriously impaired if the military cannot assure witnesses that their statements will be held in confidence" (*id.* at 17a), the court criticized the Fifth Circuit for "relying on the Air Force's conclusory affidavit and 'common sense'" (*id.* at 17a-18a, quoting *Cooper v. Department of the Navy, supra*, 558 F.2d at 277) and likewise criticized the Eighth Circuit for "speculating that disclosure would result in 'the definite possibility that the deliberative process of the Air Force will be hampered'" (App. A, *infra*, 18a, quoting *Brockway v. Department of the Air Force, supra*, 518 F.2d at 1194).<sup>3</sup>

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<sup>3</sup> The court of appeals also held (App. A, *infra*, 14a-18a) that traditional equity principles did not justify nondisclosure of the witness statements.

Accordingly, the court of appeals remanded the case to the district court to determine which portions of the witness statements are factual and which constitute predecisional advice, opinions, or recommendations that may be withheld under the deliberative process privilege incorporated into Exemption 5 (see App. A, *infra*, 12a, 18a).<sup>9</sup>

Judge Smith dissented, stressing that "[w]e deal here with the lives of the persons who fly military aircraft" (App. A, *infra*, 18a). Judge Smith stated (*id.* at 19a): "I do not think it can be said that *Merrill* constitutes a repudiation, *sub silentio*, of *Cooper* and *Brockway*. I believe those cases to be sound, and I would follow them and affirm."

#### REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question concerning the scope of the protection afforded by Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), to statements made under a promise of confidentiality by witnesses in military air crash safety investigations. If not reversed, the decision of the court of appeals requiring disclosure of such statements under the FOIA will seriously impair the ability of the military services to gather information needed to prevent aircraft accidents and will undermine the well-established privi-

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<sup>9</sup> The court of appeals reversed the portion of the district court judgment holding that an Air Force medical report fell within the deliberative process privilege as incorporated into Exemption 5 (see App. A, *infra*, 13a). The court of appeals directed the district court on remand to determine whether portions of the report constituted "factual reporting" and were consequently not covered by Exemption 5 (*ibid.*). This portion of the court of appeals' decision is not at issue here.

lege applicable to such statements in civil discovery. The decision below is in direct conflict with the rulings of two other courts of appeals and is based upon a patently erroneous interpretation of *FOMC v. Merrill*, 443 U.S. 340 (1979), in which this Court specifically declined to reach the question posed by this case (*id.* at 355 n.17). Review by this Court is therefore warranted.

1. Two courts of appeals have held that statements made under a promise of confidentiality as part of a military air crash safety investigation are protected from disclosure by Exemption 5 of the FOIA. *Cooper v. Department of the Navy*, 558 F.2d 274 (5th Cir. 1977), modified on other grounds, 594 F.2d 484, cert. denied, 444 U.S. 926 (1979); *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975). In reaching this conclusion, both courts stressed the important purposes served by preserving the confidentiality of such statements. As the Fifth Circuit aptly put it (*Cooper v. Department of the Navy*, *supra*, 558 F.2d at 277):

It seems plain, and the record bears out the notion, that in the circumstances of an aircraft accident investigation, assurances of confidentiality may be especially needed to obtain full disclosures. After all, something has gone wrong—perhaps gravely, even mortally wrong—under circumstances inherently dangerous. The machines and the procedures being employed are generally uniform and will be employed again tomorrow in the same manner unless altered. Is there something wrong with them generally? Or did the mishap (or catastrophe) occur because of a particular defect in a particular machine? Does a crewchief believe (though not with enough confidence to swear to it) that a pilot was unwell

or distracted on the occasion of a fatal flight? Does he recall that he forgot to secure some important assembly of the craft before the flight? To permit a breach of assurances of confidentiality given in order to obtain answers to such questions as these may perhaps provide access to more information in that particular case, but common sense tells us that it will likely also assure that in future cases such information will never see the light of day and will be of use to no one. Logic argues, then, that in such a circumstance as the Aircraft Accident Safety Investigation, where [promises] of confidentiality have been found helpful and perhaps essential to obtaining information upon which to base corrective action, those promises should be respected and the answers and speculations which they produce shielded from disclosure.

See also *Brockway v. Department of the Air Force*, *supra*, 518 F.2d at 1194. As previously noted, it is also the considered judgment of the military services that preserving the confidentiality of witness statements provided as part of a safety investigation is necessary to prevent air crashes and to maximize the effectiveness of military aircraft. In requiring disclosure of such statements, the court below thus reached a result viewed as dangerous both by two courts of appeals and by those most knowledgeable and experienced in determining the causes of and preventing military airplane crashes. Review by this Court is warranted to resolve the conflict in the circuits and to prevent the deleterious consequences that the decision below may produce.

2. In departing from the prior decisions of the Fifth and Eighth Circuits, the court below noted (App. A, *infra*, 7a-8a) that those decisions antedated

*FOMC v. Merrill*, *supra*. While acknowledging (App. A, *infra*, 8a n.6) that *Merrill* "expressly left open the question whether Exemption 5 incorporates" the privilege for confidential statements made to military safety investigators, the court nevertheless based its decision squarely upon what it termed *Merrill's* "new analysis of the interplay between Exemption 5 and civil litigation privileges" (App. A, *infra*, 5a). It is apparent, however, that *Merrill* does not require the result that the court of appeals reached.

a. Exemption 5 of the FOIA does not specify the particular types of agency records that may be withheld. Instead, it provides in general terms that a government agency may deny disclosure of any records "which would not be available by law to a party \* \* \* in litigation with the agency" (5 U.S.C. 522(b)(5)). Since privileged information would not usually be "available by law" in civil discovery, this Court has stated that "it is reasonable to construe Exemption 5 to exempt those documents \* \* \* normally privileged in the civil discovery context" (*NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); footnote omitted). See also *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975) ("Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context"); *EPA v. Mink*, 410 U.S. 73, 91 (1973).

In *Merrill*, this Court remarked (443 U.S. at 354) that "it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery." The Court also observed (*id.* at 355): "Given that Congress specifically recognized that certain discovery privileges [*i.e.*, executive privilege and attorney



work product privilege] were incorporated into Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution."

The court of appeals, however, read far more into *Merrill*. Stating (App. A, *infra*, 6a, quoting 443 U.S. at 359) that the *Merrill* Court "found evidence in the House Report on the FOIA \* \* \* that Congress 'specifically contemplated a limited privilege for confidential commercial information,'" the court of appeals concluded (App. A, *infra*, 6a; emphasis added):

As we read *Merrill*, this finding is the linchpin of the Court's analysis: *Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history.*

b. The court of appeals' interpretation of *Merrill* is inconsistent with the decision in *Merrill* itself, since the privilege there held to be incorporated into Exemption 5—a qualified privilege for confidential commercial information—was not "explicitly recognized" in the legislative history. Relying upon a sentence in the House Report (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)) referring to documents or information received by the government "before it completes the process of awarding a contract," the Court in *Merrill* concluded (443 U.S. at 359; emphasis added; footnote omitted): "[W]e think it is reasonable to infer that the House Report \* \* \* specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts." The Court went on to hold that the Federal Open Market Committee's Domestic Policy Directives are "at least potentially eligible for protection under Exemption 5" (*id.* at 360-361 n.23) and



explained (*id.* at 361; emphasis added): “Although the analogy is not exact, we think that the Domestic Policy Directives and associated tolerance ranges are *substantially similar* to confidential commercial information generated in the process of awarding a contract.” Thus, this Court’s decision in *Merrill* was based upon “infer[ence]” and “analogy” rather than explicit recognition by Congress of the privilege at issue.<sup>10</sup>

The court of appeals not only lost sight of what *Merrill* actually decided, it also distorted the language of this Court’s opinion. As noted above, the Court stated (443 U.S. at 359; footnote omitted): “[W]e think it is reasonable to infer that the House Report \* \* \* specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts.” Terming this sentence “the linchpin” of the analysis in *Merrill* (App. A, *infra*, 6a), the court of appeals ignored the phrase “we think it is reasonable to infer” and broadened the phrase “specifically contemplated” to mean “explicitly recognized.” The court thereby read *Merrill* to hold that “Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history” (App. A, *infra*, 6a). This is a wholly unsupportable interpretation of the *Merrill* opinion.

c. The court of appeals again departed from the teaching of *Merrill* when it examined the legislative history for evidence that Congress intended Exemp-

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<sup>10</sup> The Court noted (443 U.S. at 358 & n.21) that in hearings preceding enactment of the FOIA, the General Counsel of the Treasury Department expressed concern about premature disclosure of information concerning Federal Reserve Open Market operations. Congress, however, did not specifically express a similar concern.

tion 5 to protect witnesses statements given under a promise of confidentiality. The court stated (App. A, *infra*, 8a): "[O]ur search convinces us that neither House of Congress intended Exemption 5 to incorporate an executive privilege that protects purely factual material." Rather, the court concluded (*id.* at 10a; footnote omitted) that "Congress intended Exemption 5 to incorporate an executive privilege of limited scope, protecting 'legal or policy matters' or 'advice \* \* \* and exchange of ideas.'"

This conclusion is plainly inconsistent with *Merrill*, since it is apparent that much of the information there held to be protected by Exemption 5 would be subject to mandatory disclosure under the court of appeals' analysis. For example, bids by firms seeking a government contract or the government's appraisal of real estate it intends to sell are "purely factual," do not relate to legal or policy matters, and do not constitute advice or the exchange of ideas. Nevertheless, such information falls squarely within the protection recognized in *Merrill* for confidential commercial information received or generated before the government completes the process of awarding a contract. See, e.g., *Government Land Bank v. GSA*, 671 F.2d 663 (1st Cir. 1982) (realty appraisal).

By insisting that Exemption 5 protects only " 'legal or policy matters' " and " 'advice \* \* \* and exchange of ideas' " (App. A, *infra*, 10a), the court of appeals confused the deliberative process privilege and its rationale with the broader protection afforded by Exemption 5, which incorporates other privileges designed to serve other ends. Both in civil discovery and under Exemption 5, the deliberative process privilege does not reach "purely factual material contained in deliberative memoranda and severable from its con

text." *EPA v. Mink*, *supra*, 410 U.S. at 88. If not protected by another privilege, such facts in all likelihood will be drawn from sources accessible to the public or from government information subject to public disclosure, and therefore revealing them would not impair the government's decisionmaking processes. It does not follow, however, that all other privileges incorporated into Exemption 5 are subject to the same limitation. *Merrill* itself recognized the different purposes served by privileges embraced by Exemption 5 (443 U.S. at 359-360; emphasis added):

The purpose of the privilege for predecisional deliberations is to insure that a decision-maker will receive the unimpeded advice of his associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank. \* \* \* The theory behind a privilege for confidential commercial information generated in the process of awarding a contract, however, is not that the flow of advice may be hampered, but that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered.

See also *Brockway v. Department of Air Force*, *supra*, 518 F.2d at 1192-1193.

d. Contrary to the decision below, *Merrill* did not establish a rigid rule for determining whether a particular privilege is incorporated into Exemption 5. While advising that courts should proceed with caution before holding that Exemption 5 incorporates any privilege other than the executive and attorney privileges (443 U.S. at 355), *Merrill* held that just such a privilege fell within that Exemption. And in reaching that conclusion, *Merrill* relied upon inferences and analogies drawn from the legislative history (see *id.* at 359-363). *Merrill* also stated (*id.* at 355):

"[W]e hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another exemption."

These general principles do not dictate the result reached by the court of appeals. Certainly *Merrill* did not repudiate "the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself" and that "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See also *Dickerson v. New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 7. Particularly in view of the court of appeals' assumption (App. A, *infra*, 8a) that the statements at issue here "would be shielded from civil discovery by the *Machin* privilege," it seems obvious that those statements fall within the unambiguous language of Exemption 5, which protects materials "which would not be available by law to a party \* \* \* in litigation with the agency."

The court of appeals did not point to anything in the legislative history of the FOIA that suggests that Congress intended such statements to be disclosed. And while the privilege in question here, like that in *Merrill*, is not mentioned in the legislative history, it is fully consistent with the expressed purposes of Exemption 5. In the passage upon which *Merrill* relied (see 443 U.S. at 359), the House Report (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)) made the following observations concerning that Exemption:

Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff

assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause [Exemption 5] is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate agency secrecy.

This passage plainly supports incorporation of the *Machin* privilege. Just as "advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl'" (H.R. Rep. No. 1497, *supra*, at 10), witnesses questioned by military safety investigators would not be completely frank if their statements were subject to public disclosure. "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests \* \* \*" (*United States v. Nixon*, 418 U.S. 683, 705 (1974)). Similarly, just as government efficiency may be impaired by the premature disclosure of documents or information received or generated in preparation for the awarding of a contract or issuance of an order, decision, or regulation, the efficiency of the military's air safety program, as well as its overall effectiveness, will be adversely affected if binding promises of confidentiality may not be made to witnesses possessing vital information concerning the causes of military aircraft accidents.

For these reasons, the "flexible, commonsense approach" required for determining the scope of Exemption 5 (*EPA v. Mink, supra*, 410 U.S. at 91) must necessarily lead to incorporation of the recognized privilege for confidential witness statements such as those involved here. Exemptions to the FOIA must be given a reasonable interpretation in order to accomplish the purposes of the Act. See *Department of State v. Washington Post Co.*, 456 U.S. 595 (1982); *FBI v. Abramson*, 456 U.S. 615 (1982). The FOIA's overriding goal is to promote open government (*Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 17 (1974)) and "to ensure an informed citizenry \* \* \* [in order] to hold the governors accountable to the governed" (*NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). But disclosure of confidential statements made to military safety investigators is unlikely to promote open government, an informed citizenry, or any other beneficial purpose. If confidentiality cannot be ensured, statements provided as part of a safety investigation are unlikely to reveal anything more than those furnished in connection with the parallel collateral investigation. As a result, the information available to the public will not be increased appreciably, while that available to those concerned with aircraft safety will decrease both in quantity and reliability.<sup>11</sup>

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<sup>11</sup> It seems particularly unlikely that Congress intended to require disclosure under the FOIA of statements like those at issue here because to do so would undermine the well-established governmental privilege afforded such statements in civil litigation. See *Machin v. Zuckert, supra*; *McCormick on Evidence* § 108, at 230 n.6 (E. Cleary 2d ed. 1972); 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2019, at 169 n.22 (1970). The FOIA was not intended to be used to circumvent the rules of civil discovery. *Renegotiation Board*



Finally, it is clear that incorporating the *Machin* privilege into Exemption 5 would not substantially duplicate any other exemption.

In sum, this Court's decision in *Merrill* does not require repudiation of the prior holdings of two courts of appeals that statements given in confidence to military air crash safety investigators are protected from mandatory disclosure by Exemption 5 of the FOIA. *Merrill* certainly did not hold that the FOIA requires disclosure of materials even though they fall within the plain language of Exemption 5, and there is nothing in the legislative history even remotely suggesting that Congress intended statements such as these to be disclosed. Such a holding would be a marked departure both from this Court's prior decisions concerning the meaning of Exemption 5 and from the ordinary rules of statutory construction. If, as the court of appeals believed, there is language in *Merrill* that lends support to such a result, clarification by this Court is warranted.

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v. *Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974). See also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975). But if any person may obtain such statements upon request under the FOIA, the privilege recognized in civil discovery will be of little value. A civil litigant denied discovery of such statements on grounds of privilege will be able to circumvent the privilege by filing an FOIA request. The effective abrogation of this important and well-established privilege is a matter that warrants review by this Court.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1983

**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
NINTH CIRCUIT**

No. 80-5744

**WEBER AIRCRAFT CORPORATION, A DIVISION OF  
WALTER KIDDE AND COMPANY, INC., and  
MILLS MANUFACTURING CORPORATION,  
PLAINTIFFS-APPELLANTS**

*v.*

**UNITED STATES OF AMERICA, DEFENDANT-APPELLEE**

Argued and Submitted Nov. 27, 1981

Decided Sept. 21, 1982

Appeal from the United States District Court  
for the Central District of California

Before CANBY and NORRIS, Circuit Judges, and  
SMITH,\* District Judge.

NORRIS, Circuit Judge:

The principal issue in this case is whether witness statements given under a promise of confidentiality to an Air Force aircraft investigation board are exempt from the mandatory disclosure provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The district court held that the government was authorized to withhold the documents by Exemp-

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\* The Honorable Russell E. Smith, Senior United States District Judge for the District of Montana, sitting by designation.

tion 5 of the FOIA, 5 U.S.C. § 552(b)(5),<sup>1</sup> and by traditional equity principles. We reverse and remand.

## I. BACKGROUND

Captain Richard Hoover sustained serious injuries when he ejected from an Air Force airplane after the engine had failed. Under Air Force regulations governing inquiries into significant air crashes, the Air Force performed two investigations. A "collateral investigation" was conducted "to preserve available evidence for use in claims, litigation, disciplinary actions, administrative proceedings, and all other purposes." A.F. Reg. 110-14 ¶ 1(a) (July 18, 1977).<sup>2</sup> A "safety investigation," on the other hand, was conducted by a specially appointed Mishap Investigation Board, which produced a Mishap Report, a "privileged document" intended for "the sole purpose of taking corrective action in the interest of accident prevention." A.F. Reg. 127-4 ¶ 19(a)(1) (Jan. 1, 1973).<sup>3</sup>

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<sup>1</sup> According to 5 U.S.C. § 552(b)(5), "[the FOIA] does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

<sup>2</sup> The Air Force pursued the collateral investigation under A.F. Reg. 110-14 (Nov. 1, 1973), the predecessor to A.F. Reg. 110-14 (July 18, 1977). See also A.F. Reg. 127-4 ¶ 19(b) (Jan. 1, 1973) ("The Commander . . . will . . . direct a collateral investigation under AFR 110-14 . . .").

<sup>3</sup> A.F. Reg. 127-4 ¶ 19(a)(3) (Jan. 1, 1973) states, in part: "These reports and their attachments will not be released to the Department of Justice, any United States attorney, or any other person for litigation purposes in any legal proceeding, civil or criminal, except as stated in (4) below. These prohibitions include any action by or against the United States. These reports and their attachments will

Hoover sued designers of various parts of his parachute pack and harness assembly including Weber Aircraft Corporation (Weber), the initial designer, and Mills Manufacturing Corporation (Mills), the manufacturer of the canopy. After the suit was filed, Weber and Mills requested copies of all Air Force investigation reports pertaining to the accident. In response, the Air Force released the complete record of the collateral investigation and what the Air Force termed the factual portions of the Mishap Report, but withheld a number of documents, claiming they were exempt from mandatory disclosure under Exemption 5.

Weber and Mills then filed this action under the FOIA, seeking an injunction requiring the Air Force to disclose the withheld portions of the Mishap Report. The district court denied the injunction and

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be used solely within the USAF and will not be appended to nor enclosed in any report or document, including reports of claims investigations, unless the sole purpose of the other reports or documents is to prevent accidents."

A.F. Reg. 127-4 ¶ 19(a) (4) (Jan. 1, 1973) states: "Notwithstanding the restrictions on use of these reports and their attachments and the prohibitions in this regulation against their release, factual material included in accident/incident reports, covering examination of wreckage, photographs, plotting charts, wreckage diagrams, maps, transcripts of air traffic communications, weather reports, maintenance records, crew qualifications, and like nonpersonal evidence may be released as required by law or pursuant to court order or upon specific authorization of The Judge Advocate General after consultation with The Inspector General. Also, Federal law requires that an accused in a trial by court-martial will, upon proper court order, be furnished all statements sworn or unsworn in any form which have been given to any Federal agent, employee, investigating officer, or board by any witness who testifies against the accused."

granted the government's motion for summary judgment. On appeal, Weber and Mills claim the district court erred in not compelling production of (1) the witness statements of Captain Hoover and Airman Dickson,<sup>4</sup> and (2) the withheld portions of medical reports submitted to the Mishap Board.

## II. EXEMPTION 5

### A. *The Witness Statements*

The first issue is whether Exemption 5 permits the government to withhold statements of military personnel given under a promise of confidentiality to an Air Force accident investigation board. This is an issue of first impression in the Ninth Circuit.

Exemption 5 protects "intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." The documents here are clearly intra-agency memoranda.<sup>5</sup> The issue is how broadly we should construe the phrase "not . . . available by law." In *EPA v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), the Supreme Court left open the possibility that Ex-

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<sup>4</sup> Airman Dickson testified about his involvement in rigging the malfunctioning survival kit and automatic deployment assembly of Hoover's parachute.

<sup>5</sup> Appellants cite *Temple-Eastex, Inc. v. NLRB*, 410 F.Supp. 183, 185 (E.D. Tex. 1976), for the proposition that sworn statements are not inter-agency or intra-agency memoranda under Exemption 5. The present case, however, unlike *Temple-Eastex*, involves statements by government employees. Captain Weber and Airman Dickson were employed by the Air Force when they gave their statements. Their status can thus be measured by "the simplest measure of who is 'within' an agency: the payroll." *County of Madison v. United States Department of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981).

emption 5 might incorporate all civil litigation privileges: "Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies." *Id.* at 91, 93 S.Ct. at 837. More recently, however, the Court noted that "it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery." *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 354, 99 S.Ct. 2800, 2809, 61 L.Ed.2d 587 (1979). Because the Court developed a new analysis of the interplay between Exemption 5 and civil litigation privileges, we now consider *Merrill* and its implications.

1. *The Merrill analysis.*

In *Merrill*, the Federal Open Market Committee (Committee) sought nondisclosure of certain monetary policy directives for the month during which they were in effect. The government first argued broadly that "Exemption 5 confers general authority upon an agency to delay disclosure of intra-agency memoranda that would undermine the effectiveness of the agency's policy if released immediately." 443 U.S. at 353, 99 S.Ct. at 2808. The Court flatly rejected that contention, *id.*, emphasizing that the government must rest its claim "on a privilege enjoyed by the Government in the civil discovery context," *id.* at 354, 99 S.Ct. at 2809.

The Court then agreed with the government's contention that the Committee's monetary policy directives could plausibly be shielded from civil discovery by a qualified privilege for confidential commercial information. *Id.* at 355-56, 99 S.Ct. at 2809-2810.

At the same time, the Court stressed that Exemption 5 should not be construed to incorporate all civil litigation privileges. *Id.* at 354, 99 S.Ct. at 2809. Noting that the legislative history to Exemption 5 “expressly mentioned” two privileges—attorney work product and the executive privilege for predecisional deliberations—the Court warned that a claim that Exemption 5 incorporates any other privilege “must be viewed with caution.” *Id.* at 355, 99 S.Ct. at 2809. The Court then considered whether Exemption 5 incorporates any other civil discovery privilege, specifically the privilege for confidential commercial information.

The Court in *Merrill* first reviewed the legislative history of the FOIA for evidence that Congress intended to incorporate this specific privilege into Exemption 5. The Court found evidence in the House Report on the FOIA, H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), that Congress “specifically contemplated a limited privilege for confidential commercial information.” 443 U.S. at 359, 99 S.Ct. at 2811. As we read *Merrill*, this finding is the linchpin of the Court’s analysis: Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history. Justice Stevens, in dissent, stated without rebuttal that the Court “proposes . . . that only those privileges that are recognized in the legislative history of FOIA should be incorporated in the Exemption.” *Id.* at 366 n. 2, 99 S.Ct. at 2815 n. 2 (Stevens, J., dissenting).

The *Merrill* opinion went on to determine whether incorporating into Exemption 5 a qualified civil-litigation privilege for confidential commercial information would substantially duplicate the effect of any other FOIA exemption. *Id.* at 360, 99 S.Ct. at



2812. We think it clear, however, that the Court would not have undertaken this second step in its analysis unless it had first determined from the legislative history that Congress specifically intended Exemption 5 to encompass the privilege for confidential commercial information.

## 2. Brockway and Cooper.

Before the Supreme Court decided *Merrill*, the Fifth and Eighth Circuits held that Exemption 5 permits nondisclosure of witness statements given to military aircraft investigation boards under a promise of confidentiality. *Cooper v. Department of the Navy*, 558 F.2d 274, 278-79 (5th Cir. 1977), *modified on other grounds*, 594 F.2d 484, *cert. denied*, 444 U.S. 926, 100 S.Ct. 266, 62 L.Ed.2d 183 (1979); *Brockway v. Department of the Air Force*, 518 F.2d 1184, 1193 (8th Cir. 1975). The Air Force relies heavily on these cases as precedent for nondisclosure of the witness statements.

Both courts held that, because Exemption 5 protects information unavailable "by law," the exemption incorporates the civil-discovery privilege found in *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896, 84 S.Ct. 172, 11 L.Ed.2d 124 (1963). *Brockway*, 518 F.2d at 1190-91; *see Cooper*, 558 F.2d at 277. *Machin* held that the Air Force was privileged from disclosing in civil discovery statements given to a military accident investigation board under a promise of confidentiality. 316 F.2d at 339. In *Machin*, the D.C. Circuit had expressed concern that disclosure in civil litigation discovery would "hamper the efficient operation of an important Government program and perhaps even . . . impair the national security by weakening a branch of the mili-

tary." *Id.* Reasoning that incorporation of the *Machin* privilege into Exemption 5 would serve the purposes of that exemption, and protect the military's "deliberative processes," the *Cooper* and *Brockway* courts both concluded that Exemption 5 incorporates that privilege. 558 F.2d at 277; 518 F.2d at 1194.

### 3. *Merrill Applied.*

Guided by the *Merrill* analysis, we now consider whether the *Brockway* and *Cooper* courts were correct in concluding that Exemption 5 incorporates the *Machin* privilege, which the Supreme Court termed the executive "privilege for 'official government information' whose disclosure would be harmful to the public interest." *Merrill*, 443 U.S. at 355 n. 17, 99 S.Ct. at 2810 n. 17.\*

For purposes of our analysis, we assume that the witness statements here would be shielded from civil discovery under the *Machin* privilege. *See Machin*, 316 F.2d at 339; *see also Merrill*, 443 U.S. at 355 n. 17, 99 S.Ct. at 2810 n. 17. We therefore apply the *Merrill* analysis to determine whether Congress intended Exemption 5 to protect factual material shielded from civil discovery by the *Machin* privilege.

The critical step in the *Merrill* analysis involves a search of the FOIA legislative history for evidence that Congress intended Exemption 5 to incorporate an executive privilege for "official government information." Our search convinces us that neither House of Congress intended Exemption 5 to incorporate an executive privilege that protects purely factual material. Indeed, the Senate Report assumes that Ex-

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\* The Supreme Court in *Merrill* expressly left open the question whether Exemption 5 incorporates this privilege. 443 U.S. at 355 n.17, 99 S.Ct. at 2810 n.17.

emption 5 would protect only "legal or policy matters." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). Moreover, the legislative history suggests that Congress intended Exemption 5 to encompass factual material which is "inextricably intertwined" with legal or policy matters, but not to protect "memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context." *EPA v. Mink*, 410 U.S. 73, 87-88, 93 S.Ct. 827, 836, 35 L.Ed.2d 119 (1973).<sup>7</sup>

The Eighth Circuit in *Brockway* acknowledged the language of the Senate Report, but found such evidence of legislative intent unconvincing: "The House Report . . . is not as explicit in limiting Exemption 5 to only legal or policy matters . . ." 518 F.2d at 1190. We disagree. Although the House Report is somewhat ambiguous,<sup>8</sup> it does contain evidence that

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<sup>7</sup> A previous bill contained an exemption for "inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy." *EPA v. Mink*, 410 U.S. 73, 90, 93 S.Ct. 827, 837, 35 L.Ed.2d 119 (1973) (quoting S. 1160, 89th Cong., 1st Sess. (1965)). This formulation was severely criticized for permitting "compelled disclosure of an otherwise private document simply because the document did not deal 'solely' with legal or policy matters. . . . As a result of this criticism, Exemption 5 was changed to substantially its present form." *Id.* at 90-91, 93 S.Ct. at 837. The change was not intended to weaken the factual-deliberative distinctive, however, "but to assure that factual material inextricably intertwined with deliberative material would also be exempt." *Robbins Tire & Rubber Co. v. NLRB*, 563 F.2d 724, 735 (5th Cir. 1977), *rev'd on other grounds*, 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978).

<sup>8</sup> The House Report speaks broadly of protecting the secrecy of "documents or information which [a government agency] has received." H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

Exemption 5 was meant to protect only "advice from staff assistants and the exchange of ideas among agency personnel." H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

Thus both the Senate and House Reports contain evidence that Congress intended Exemption 5 to incorporate an executive privilege of limited scope, protecting "legal or policy matters" or "advice . . . and exchange of ideas."<sup>9</sup> But we find no evidence in the legislative history that Congress intended Exemption 5 to protect witness statements given under a promise of confidentiality.

The legislative scheme of the FOIA, viewed as a whole, supports this reading of the House and Senate Reports. Congress enacted the FOIA to replace parts of the Administrative Procedure Act which, although designed to require disclosure of government information, "ha[d] been used as an authority for with-

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<sup>9</sup> Indeed, the Supreme Court's conception of Exemption 5 has consistently reflected this legislative history. See, e.g., *FBI v. Abramson*, — U.S. —, —, 102 S.Ct. 2054, 2064, 72 L.Ed.2d 376 (1982) (the purpose of Exemption 5 is "protecting the give-and-take of the decisional process"); *EPA v. Mink*, 410 U.S. 73, 89, 93 S.Ct. 827, 836, 35 L.Ed.2d 119 (1973) ("Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other."); see also *Brockway*, 518 F.2d at 1190 ("In defining the scope of Exemption 5, most courts have held that the exemption generally operates to protect 'internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports.'") (quoting *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971)).

holding, rather than disclosing, information." H. Rep. No. 1497, 89th Cong., 2d Sess. 4 (1966). The old law had permitted executive agencies to withhold information on the bare assertion that disclosure would not be in " 'the public interest.' " *Id.* at 5. The lack of guidelines in the old law led to abuse, because "[n]o Government employee at any level believes that the 'public interest' would be served by disclosure of his failures or wrongdoings." *Id.* at 9. Congress's purpose in enacting the FOIA was to curtail this abuse. *See id.* at 3-6; S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). The Senate and House Reports accordingly agreed "that all *materials* of the Government are to be made available to the public . . . unless explicitly allowed to be kept secret by one of the exemptions." S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965); *see* H. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). Further, the Senate Report expressly states that the Committee "attempted to delimit [Exemption 5] as narrowly as consistent with efficient Government operation." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

A decision that Exemption 5 incorporates the *Machin* civil discovery privilege for official government information would be inconsistent with the legislative mandate to "delimit" the exemption narrowly. We believe the *Machin* privilege exceeds the scope Congress envisioned for Exemption 5. The *Machin* privilege protects statements of ministerial reporters of fact as well as of decisionmakers, and permits the government to shroud investigative reports in secrecy. We therefore conclude that the legislative history to the FOIA reveals no evidence that Congress intended

Exemption 5 to encompass the *Machin* civil-discovery privilege for official government information.<sup>10</sup>

To decide that the FOIA authorizes the government to withhold the witness statements at issue, we would have to amend the FOIA judicially. This we are unwilling to do. Opening up the FOIA to broad judicial interpretation would bring us full circle, creating the very evil Congress sought to avoid when it passed the FOIA, and "suggest[ing] no principled manner in which to confine FOIA's scope." *County of Madison v. United States Department of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981).

We hold that Exemption 5 does not incorporate the *Machin* civil-discovery privilege for official government information. However, because Exemption 5 does incorporate the executive privilege for predecisional deliberations, we hold that the Air Force may withhold any "reasonably segregable" portion of the witness statements containing advice, opinions or recommendations, *see* 5 U.S.C. § 552(b), but must disclose any factual portion of the witness statements at issue. On remand, the district court must determine which portions, if any, contain advice, opinion or recommendations which the government may withhold from disclosure.

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<sup>10</sup> Exemption 5 is the only FOIA exemption properly before us on this appeal. We have already noted that the second step of the *Merrill* analysis—whether incorporating a particular civil discovery privilege into Exemption 5 would substantially duplicate the coverage of another exemption—is unnecessary when a court determines, as we have here, that the legislature did not intend to incorporate the privilege into Exemption 5. *See* part II A. 1., *supra*.



## B. *The Medical Report*

The next issue is whether Exemption 5 protects "[a] one-page internal Air Force letter . . . [which] discusses the *findings* and recommendations of the life sciences member of the aircraft accident investigation board and contains further recommendations with regard to safety actions that should be considered for adoption by the Air Force." Affidavit of Major General Harold R. Vague, Judge Advocate General, United States Air Force (JAG) (emphasis added). Relying on the JAG's affidavit, *see EPA v. Mink*, 410 U.S. 73, 93, 93 S.Ct. 827, 838, 35 L.Ed.2d 119 (1973) (district court may rely on affidavits to determine content of documents); *Church of Scientology v. United States Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1979) (same), the district court found that the one-page medical report contains "opinions, conclusions, and speculations," *Weber Aircraft Corp. v. United States*, No. CV 79-2883, slip op. at 5 (C.D. Cal. Aug. 15, 1980) (unpublished findings of fact and conclusions of law), and authorized the Air Force to withhold the report.

It is unclear from the face of the affidavit what the JAG meant when he stated that the letter discusses the life science member's "findings." To the extent the "findings" constitute factual reporting, they are not covered by Exemption 5. To the extent the "findings" constitute "opinions, conclusions and speculations" forming the basis of recommendations, they are protected by Exemption 5. As we are unable to determine whether the district court had this distinction in mind when it reviewed the affidavit, we remand for reconsideration of the medical report in light of this opinion.

### III. TRADITIONAL EQUITY PRINCIPLES

As an alternative ground for its summary judgment in favor of the government, the district court held that "[t]he 'public interest,' which is the 'primary consideration' in balancing the equities, is best served by non-disclosure of the documents. . . . Thus, using 'traditional equity principles,' the balance here is clearly in favor of the defendant and non-disclosure of the documents." *Id.* at 4. The government argues that the district court correctly concluded that it may exercise its broad traditional equity powers to permit nondisclosure of documents not protected by a specific FOIA exemption.

The language and legislative history of the FOIA refute the government's position. To the contrary, the language of the FOIA forbids the government to withhold information under the Act "except as specifically stated in [the FOIA]." 5 U.S.C. § 552(c); see *EPA v. Mink*, 410 U.S. at 79, 93 S.Ct. at 832 (FOIA exemptions "are explicitly made exclusive"). A court's exercise of its general equity powers is therefore repugnant to the FOIA's overriding purpose, "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); accord *County of Madison v. United States Department of Justice*, 641 F.2d 1036, 1041 (1st Cir. 1981); *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) ("We are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself.").

Further, the legislative history of the FOIA demonstrates Congress' intent to restrict judicial discre-

tion. "It is essential that agency personnel, *and the courts as well*, be given definitive guidelines in settling information policies. . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965) (emphasis added); <sup>11</sup> see *EPA v. Mink*, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973); *Soucie v. David*, 448 F.2d 1067, 1077 n. 39 (D.C. Cir. 1971). The careful balancing of interests which Congress attempted to achieve in the FOIA would be upset if courts could exercise their general equity powers to authorize nondisclosure of material not covered by a specific exemption. *Id.* at 1077. We thus conclude that, in enacting the FOIA, Congress did not intend to leave district courts with authority to use their broad traditional equity powers to permit government agencies to withhold information.

We further conclude that the government's reliance on language in *Theriault v. United States*, 503 F.2d

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<sup>11</sup> While the language of the Senate Report is unequivocal, the House Report raises some questions, stating that a court "will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld." H. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966). We nonetheless find this language unhelpful to the government's cause. Nowhere is there any indication that a court may exercise broad equity powers to authorize nondisclosure. Indeed, that would directly contradict Congress' purpose in enacting the FOIA, "to make clear beyond doubt that all materials of Government are to be available to the public unless specifically exempt from disclosure." *Id.* at 11. See generally Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1150-56 (1975).

390 (9th Cir. 1974), is misplaced. In *Theriault*, we stated: " 'In exercising the equity jurisdiction conferred by the Freedom of Information Act, the court must weigh the effects of disclosure and nondisclosure, according to traditional equity principles.' " *Id.* at 392 (quoting *General Services Administration v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969)). The government argues that this language authorized the district court to exercise its broad traditional equity powers in the case now before us. The government's interpretation of *Theriault*, however, ignores other qualifying language in the opinion indicating that district courts may use their equity powers to authorize nondisclosure under the FOIA only when "dire adverse potentialities" would result. 503 F.2d at 392 (citing *Rose v. Department of the Air Force*, 495 F.2d 261, 269 (2d Cir. 1974), (the judiciary may use its equity power in "a truly exceptional case."), *aff'd on other grounds*, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976); see also *Halperin v. Department of State*, 565 F.2d 699, 706 (D.C. Cir. 1977) (courts are left with "some discretion in extreme circumstances" to use their equity powers to avoid disclosure of government information which would "do grave damage to the national security"). Moreover, the government's expansive reading of *Theriault* would result in nondisclosure of documents on a bare "public interest" rationale, see, e.g., *Theriault v. United States*, 395 F.Supp. 637, 642 (C.D. Cal. 1975), despite the Supreme Court's recent admonition that Congress repeatedly rejected "any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague 'public interest' standard." *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 354, 99 S.Ct. 2800, 2809, 61 L.

Ed.2d 587 (1979). In light of *Merrill*, we conclude that *Theriault* must be read narrowly to mean that courts may use their equity power under the FOIA to authorize nondisclosure of information only in "extreme" or "exceptional" circumstances.

In the case now before us, however, the circumstances are neither "extreme"<sup>12</sup> nor "exceptional." We are hardly dealing with extremely sensitive information such as military secrets or troop movements. The government does not claim that disclosure of the factual portions of the witness statements will cause immediate and irreparable harm to the public interest. Rather the government's concern is that future aircraft accident investigations will be seriously impaired if the military cannot assure witnesses that their statements will be held in confidence. If that in fact proves to be the case, the Air Force should look for a solution to its problem in new legislation, not judicial improvisation. See *United States v. Olympic Radio & Television, Inc.*, 349 U.S. 232, 236, 75 S.Ct. 733, 736, 99 L.Ed. 1024 (1955). The government can make its case to Congress that confidentiality of witness statements is critical to the Air Force's longterm ability to obtain information in accident investigations. Only Congress can properly balance the Air Force's claim of future need against the public's interest in maximum disclosure of government information. The judiciary can at best speculate. See, e.g., *Cooper*, 558 F.2d at 277 (relying on the Air Force's conclusory affidavit and "common

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<sup>12</sup> The government has offered no record support for its conclusory argument that shielding the witness statements at issue would "safeguard the lives of flight crews, enhance the safety of those upon whom aircraft might otherwise fall, and contribute to the national defense." Appellee's brief at 11.

sense" for its conclusion that incorporating the *Machin* civil discovery privilege into Exemption 5 was necessary to protect the Air Force's "decisional processes"); *see also Brockway*, 518 F.2d at 1194 (speculating that disclosure would result in "the definite possibility that the deliberative processes of the Air Force will be hampered."). Congress has given continued attention to the FOIA, amending it to conform to the legislative will; judicial amendments are both unnecessary and inappropriate. *See Project, Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1156 n. 1131 (1975).

REVERSED AND REMANDED for further proceedings consistent with this opinion.

RUSSELL E. SMITH, Senior District Judge, dissenting.

I dissent.

We deal here with the lives of the persons who fly military aircraft. The Air Force asserts a privilege which it considers essential to its air safety program. The district court sustained the privilege and found on evidence that there was a substantial need for the nondisclosure policy.<sup>1</sup>

In *Machin v. Zurkert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896, 84 S.Ct. 172, 11 L.Ed.2d 124 (1963), which was decided before the enactment of the FOIA, a privilege was found to exist as to statements given to the Air Force under promises that the statements would be held confidential. Following the enactment of the FOIA, the Fifth and Eighth Circuits, in *Cooper v. Department of the*

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<sup>1</sup> *See Cooper v. Department of the Navy*, 558 F.2d 274, 276 (1977), *cert. denied*, 444 U.S. 926, 100 S.Ct. 266, 62 L.Ed.2d 183 (1977).



*Navy*, 558 F.2d 274, *cert. denied*, 444 U.S. 926, 100 S.Ct. 266, 62 L.Ed.2d 183 (1977), and *Brockway v. Department of the Air Force*, 518 F.2d 1184 (1975), relied on *Machin* and, notwithstanding the FOIA, recognized the identical privilege asserted here.

The Supreme Court in *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 99 S.Ct. 2800, 61 L.Ed.2d 587 (1979), did not decide the exact question presented here, nor did it decide whether the privilege announced in *Machin* survived the enactment of the FOIA. In *Merrill* the Court said:

The two other privileges advanced by the FOMC are a privilege for "official government information" whose disclosure would be harmful to the public interest, see *Machin v. Zuckert*, 114 U.S. App. D.C. 335, 338, 316 F.2d 336, 339, *cert. denied*, 375 U.S. 896 [84 S.Ct. 172, 11 L. Ed.2d 124] (1963), and a privilege based on Fed. Rule Civ. Proc. 26(c) (2), which permits a court to order that discovery "may be had only on specified terms and conditions, including a designation of the time or place." In light of our disposition of this case, we do not consider whether either asserted privilege is incorporated in Exemption 5.

443 U.S. at 355-56, n. 17, 99 S.Ct. at 2809-2810, n. 17. In view of the quoted language, I do not think it can be said that *Merrill* constitutes a repudiation, *sub silentio*, of *Cooper* and *Brockway*. I believe those cases to be sound, and I would follow them and affirm.

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APPENDIX B

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-2883-WPG (Px)

WEBER AIRCRAFT CORPORATION, an unincorporated  
division of WEBER KIDDE AND COMPANY, INC.;  
MILLS MANUFACTURING CORPORATION, PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT

[Filed Aug. 15, 1980]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The Court having fully considered the defendant's Motion for Summary Judgment, the pleadings, all the memoranda filed herein, the affidavits attached thereto, and the argument of counsel, hereby makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. On October 9, 1973, Richard Hoover, Captain, United States Air Force, Retired, sustained injuries during an ejection from an Air Force F-106 B aircraft. The Air Force, pursuant to its regulation (AFR 127-4 dated October 24, 1975 and AFR 110-14, dated July 18, 1977) conducted investigations to determine the cause of the accident and to make recommendations as to the corrective action necessary to preclude future accidents.

2. Plaintiffs, Weber Aircraft Corporation and Mills Manufacturing Corporation, the defendants in a suit for damages brought by Captain Richard Hoover as a result of the injuries he sustained, implementing the Freedom of Information Act, requested that they be provided a complete copy of the Air Force Accident Investigation Report for their use in the suit for damages.

3. Plaintiffs requested a complete copy of said report September 1 and 6, 1977. Major General, Richard E. Merklings, Commander, Air Force Inspection and Safety Center, Norton Air Force Base, denied plaintiffs' request for the complete report on September 30, 1977. Major General Merklings provided plaintiffs with substantial parts of the Report. The excised portions of the Report are the following: investigating board's opinions, conclusions, findings and recommendations; the statements of witnesses before the board; and certain points of the Life Sciences report containing medical data pertaining to Captain Hoover.

4. The decision to withhold portions of the report was appealed by plaintiffs to the Secretary of the Air Force on November 25, 1977. Deputy Administrative Assistant to the Secretary of the Air Force, El-

don L. McColl, granted the appeal in part, portions of five pages of the Life Sciences Report was made available to plaintiffs.

5. Plaintiffs exhausted all administrative remedies available to them prior to filing this action under the Freedom of Information Act, 5 U.S.C. 552. On July 31, 1979, plaintiffs instituted this action requesting this court to enjoin the Air Force from withholding the excised documents.

6. Since 1944, it has been the policy of the Air Force that aircraft accident investigations under the Air Force Aviation Safety Program are to be used solely for aviation safety and will not be used for any disciplinary actions or disclosed to anyone outside of the Air Force. This policy was established to create an atmosphere that would permit aircraft accident witnesses to be completely frank and uninhibited in providing information to the accident investigators in the course of their examination under the Air Force Aviation Safety Program. In order to insure that witnesses understand this policy, the Air Force regulation (AFR 127-4 dated July 18, 1977) requires that witnesses to aircraft accidents be advised that "their testimony will be used solely for the purposes of flight safety and will not be released to persons outside of the Air Force." This promise is made to persuade witnesses, who are not sworn, to express their opinions and talk freely even though the information revealed may be unsupported in fact, self-incriminating, embarrassing or cast blame upon a friend or co-worker.

7. The Air Force likewise desires that the Safety Program investigators in evaluating the information they gather from the witnesses be completely candid in determining the cause of the accident. They are

encouraged to speculate, opine, analyze and make recommenadtions that may not be fully supported by facts. In order to insure that all possible causes of an accident are identified and considered and all corrective actions are weighed, investigators operate with the understanding that their deliberations and their report will not be released outside of the Air Force or used for any purpose other than aviation safety.

8. The defendant has demonstrated a substantial need for non-disclosure of the documents in question in this action; and plaintiffs have made no showing sufficient to outweigh defendant's needs.

9. The "public interest," which is the "primary consideration" in balancing the equities, is best served by non-disclosure of the documents.

10. Thus, using "traditional equity principles," the balance here is clearly in favor of the defendant and non-disclosure of the documents.

11. To the extent that these Findings of Fact contain Conclusions of Law, they shall be deemed incorporated within the Conclusions of Law.

### CONCLUSIONS OF LAW

12. This Court has jurisdiction over the subject matter of this action, the action being to enjoin the defendant from withholding the complete, that is, certain unprovided portions of the aforesaid Air Force accident investigation report, pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

13. The Freedom of Information Act was passed to increase the public's access to governmental records unless the records fall within the ambit of one of nine exemptions contained in the act. These exemptions are to be construed narrowly. *Sterling Drug, Inc. v. Federal Trade Commission*, 450 F.2d



698 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1967). Whenever governmental records are withheld, the burden of establishing their exemption from mandatory disclosure rests with the agency concerned. 5 U.S.C. § 552(a) (3).

14. In addition to, and notwithstanding the applicability of the aforementioned nine exemptions, the trial court has and must exercise equity jurisdiction in that the Court must weigh the effects of disclosure and non-disclosure according to traditional equity principles and determine the best course to follow in the given circumstances. "The effect on the public is the primary consideration." *Theriault v. United States*, 503 F.2d 390, 392 (9th Cir. 1974).

15. The defendant has demonstrated a substantial need for non-disclosure of the documents in question in this action; and plaintiffs have made no showing sufficient to outweigh defendant's needs as a matter of law as well as fact.

16. The "public interest," which is the "primary consideration" in balancing the equities, is best served by non-disclosure of the documents as a matter of law as well as fact.

17. Thus, using "traditional equity principles," the balance here is clearly in favor of the defendant and non-disclosure of the documents as a matter of law as well as fact.

18. The findings and recommendations of the Accident Board, the Board's proceedings, and the final pages of the Life Science reports contain opinions, conclusions, and speculations which are "intra-agency" communications that would not be available by law to a party other than an agency in litigation with an agency, and hence are exempted from mandatory disclosure by the provisions of 5 U.S.C. § 552(b) (5).

*Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972); *International Paper Company v. F.P.C.*, 438 F.2d 1349 (2d Cir. 1971); *Machin v. Zuckert*, *supra*.

19. To the extent that these Conclusions of Law contain Findings of Fact, they shall be deemed incorporated within the Findings of Fact.

DATED: This 14 day of August, 1980.

/s/ William P. Gray  
WILLIAM P. GRAY  
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-2883-WPG (Px)

WEBER AIRCRAFT CORPORATION, an unincorporated  
division of WALTER KIDDE AND COMPANY, INC.;  
MILLS MANUFACTURING CORPORATION, PLAINTIFFS

*vs.*

UNITED STATES OF AMERICA, DEFENDANT

[Filed Aug. 15, 1980]

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law filed herewith, it is the judgment of the Court that:

1. The permanent injunction sought by the plaintiffs, to require the Air Force to provide plaintiffs with a complete copy of the Aircraft Accident Report on the October 9, 1973 accident wherein Captain Richard Hoover sustained injuries, and particularly the portions thereof not heretofore provided to plaintiffs, be and the same hereby is denied;

2. The complaint and each and every cause of action therein alleged is hereby dismissed with prejudice; and

3. Each party to bear its own costs.

DATED: 8/14/80

/s/ William P. Gray  
WILLIAM P. GRAY  
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 80-5744

D.C. No. CV 79-02883

WEBER AIRCRAFT CORPORATION, a division of WALTER  
KIDDE AND COMPANY, INC., and MILLS MANUFAC-  
TURING CORPORATION, PLAINTIFFS-APPELLANTS

*vs.*

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed Dec. 3, 1982]

ORDER

Before: CANBY and NORRIS, Circuit Judges, and  
SMITH \*, District Judge.

Judges Canby and Norris have voted to deny the petition for rehearing. Judge Smith would grant the petition for rehearing. The panel as constituted in the above case unanimously rejects the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

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\* The Honorable Russell E. Smith, Senior United States District Judge for the District of Montana, sitting by designation.

## APPENDIX E

Air Force Regulation 127-4 (Jan. 1, 1973), provided in pertinent part:

**19. Purpose and Limitations on the Use of Accident and Incident Reports.** This paragraph does not apply to ground or explosives accident/incident reports.

a. **Privileged Reports.** These reports and their attachments are prepared by, for, or at the direction of The Inspector General, USAF, and his deputies, directors, and assistants and are, therefore, privileged documents. (The disposition of privileged documents will be as directed by AFM 12-50 and AFR 205.1.) When destruction is authorized for unclassified reports, tear or otherwise deface documents in a manner that offers positive assurance against further access to the information.

(1) Reports and investigations of USAF accidents and incidents made under this regulation will be used only within the USAF to determine all factors contributing to the mishap for the sole purpose of taking corrective action in the interest of accident prevention (see paragraph 20).

(2) These reports and their attachments will not be used as evidence nor to obtain evidence for disciplinary action; as evidence in determining the misconduct or line-of-duty status of any personnel; as evidence before flying evaluation boards; as evidence to determine pecuniary liability; or, except as stated in (4) below, as evidence to determine liability in claims against the US Government.

(3) These reports and their attachments will not be released to the Department of Justice, any

United States attorney, or any other person for litigation purposes in any legal proceeding, civil or criminal, except as stated in (4) below. These prohibitions include any action by or against the United States. These reports and their attachments will be used solely within the USAF and will not be appended to nor enclosed in any report or document, including reports of claims investigations, unless the sole purpose of the other reports or documents is to prevent accidents. This prohibition includes crash, preliminary, supplementary, and progress reports, formal reports on AF Forms 711, and special accident/incident investigative reports prepared by the Dir of Aerospace Safety.

(4) Notwithstanding the restrictions on use of these reports and their attachments and the prohibitions in this regulation against their release, factual material included in accident/incident reports, covering examination of wreckage, photographs, plotting charts, wreckage diagrams, maps, transcripts of air traffic communications, weather reports, maintenance records, crew qualifications, and like nonpersonal evidence may be released as required by law or pursuant to court order or upon specific authorization of The Judge Advocate General after consultation with The Inspector General. Also, Federal law requires that an accused in a trial by court-martial will, upon proper court order, be furnished all statements sworn or unsworn in any form which have been given to any Federal agent, employee, investigating officer, or board by any witness who testifies against the accused.

b. Collateral Investigation. The commander who assumes investigative responsibility will, at



the time he appoints the aircraft or missile accident investigation board, direct a collateral investigation under AFR 110-14, when claim(s) against the government for property damage exceeds \$25,000, or if fatal or major injury occurs to any person as a result of the accident, or if the possibility of litigation against the government or a government contractor may arise from the accident. The collateral investigation is conducted independently and apart from any portion of the accident investigation, and is used to obtain and preserve all available evidence for use in litigation, claims, disciplinary action, or adverse administrative actions. (See AFR 110-14 for factual information that may be released to a collateral board as well as nonfactual material that will not be furnished to a collateral board.)

No. 82-1616

U.S. Supreme Court, U.S.  
FILED

AUG 8 1983

ALEXANDER L. STEVAS,  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1982

---

UNITED STATES OF AMERICA,

*Petitioner*

v.

WEBER AIRCRAFT CORPORATION, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**JOINT APPENDIX**

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PETITION FOR WRIT OF CERTIORARI FILED MARCH 31, 1983.  
CERTIORARI AUTHORIZED JUNE 27, 1983.

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# DOCKET ENTRIES

C.D. Cal. Civ. No. 79-2883 WPG

WEBER AIRCRAFT CORP., ET AL.

vs

USA

DATE	NR.	PROCEEDINGS
7/31/79	pg	1. Fld complt. Issd summs. Case maybe ref to Mag. Penne.
8/13/79	cm	2. Fld ORD (WPG + DWW) transfrng actn to the cal of Judge William P. Gray for all fur procedngs. Attys notfd.
8/31/79	rlb	3. Fld summs rtnd Not srvd.
11/30/79	rlb	4. Fld alias summs rtnd srvd 11/9/79.
1/18/80	rlb	5. Fld deft's ANSWER to COMPLAINT.
3/ 6/80	rlb	6. Fld Crt's ntc of prlm PTC for 4/21/80, 4pm.
4/21/80	rlb	7. MIN ORD: Informal PTC had in cham- bers.
4/24/80	rlb	8. Fld pltf's ntc of tkng depos of Robert W. Crittenden & for prod of docs on 6/17/80.
		9. Fld plf's ntc of tkng depos of Major General Richard E. Merkling & for prod of do on 5/30/80.
5/ 2/80	rlb	10. Fld deft's ntc Of mot & mot, rtnble 5/19/80, 10am, for S/J; memo of P/As; affds LODGED deft's proposed finds of fact & cncl of law. LODGED deft's proposed jdgmt.

DATE	NR.	PROCEEDINGS
5/ 5/80	rlb	11. Fld prae for & issd depo subp as to Major General Richard E. Merkling.
5/16/80	rlb	12. Fld plfs' ex parte app & rqst to cont mot for S/J; memo of P/As; affds of Silberberg & Galardi.
5/19/80	rlb	13. Fld support by Real Party in Intrest of mot for S/J by deft agnst plfs re prod of privileged docs.
		14. MIN ORD: Hrg re defts' Mot for S/J: Matter cntd to 7/7/80, 10am & fur tkng of depos is enjoined pending fur hrg.
5/27/80	rlb	15. Fld plfs' ntc of cancellation of depos of Robert W. Crittenden & Major General Richard E. Merkling.
6-24-80	cg	16. Fld pltfs appendix memo of P/A in oppos to govts motn for S/J
		17. Fld pltfs memo of P/A in oppos to govts motn for S/J arg, stmt of genuine issues, findngs & conclu of law LODGED—pltfs prop findngs & conclu of law
6-26-80	kt	18. Fld pltf Mills Mfg Corp's stmt of genuine issues
7- 8-80	lf	19. Fld Stip & ORD cont govt mtn for S/J to 8-4-80, 10AM
7-28-80	sb	20. Fld deft's reply to pltf opp to govt motn for S/J
8/15/80	rlb	21. Fld deft's finds of fact & cncls of law.
		22. Fld jdgmt & ORD thereon that plfs' perm inj is Denied; that the cmplt is dismiss w/prej; ea prty bear its own costs. (Ent 8/18/80 m/cpys ntfd prtys) JS-6



DATE	NR.	PROCEEDINGS
*8/ 4/80	rz	23. MIN ORD: Crt hrs oral arg. Deft's mot fr S/J GRANTED. Crt shall allow pltf 5 days to submit objs to proposd jgmt
9-19-80	1w24	Fld pltf's NOTC OF APPEAL to 9th Cir C/A frm JDGMT ent 8-18-80 \$70.00 fldng & docket fees pd.  25. Fld pltf's Designation of Reporter's Transcripts

## DOCKET ENTRIES

9th CIR.

No. 80-5744

WEBER AIRCRAFT CORP., ET AL.

v.

UNITED STATES

DATE	FILINGS-PROCEEDINGS
1980	
Sep 26	DOCKET NUMBER ASSIGNED. -db- JS34 prepared
Oct 1	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. -db-
Oct 29	Filed CERTIFICATE OF RECORD (10/21). ss
Oct 29	Aplt (Weber) opening brief due 12/8/80. ss
Nov 18	Fld mtn & ord (Clk) gtng Aplt/Pet ext of time to fl opng/reply brf to Dec 8 1980
Nov 28	Fld mtn & ord (Clk) gtng Aplt/Pet ext of time to fl opng/reply brf to: Jan 5 1981
Dec 19	Fld mtn & ord (Clk) gtng Aplt/Pet ext of time to fl opng/reply brf to: Feb 27 1981
1981	
Feb 23	Fld mtn & ord (CLK) gtng Appellants an ext of time to file thier Opening brief to: 4-13-81. bbm
March 12	Filed, as of March 11, aplt's (MILLS MFG CORP) motin for leave to file oversized brief. (CIVATT) 3/9 -db-
March 27	Filed order (SCHROEDER) upon due consideration of Mills Mfg. Corp.'s motion for leave to file an oversized brief, the motion is denied. -db-
Apr 16	FILED ORIG & 15 APLTS' OPENING BRIEFS & EXCERPT OF RECORD. 4/13 ec

DATE	FILINGS-PROCEEDINGS
1981	
May 7	Recvd aplts' copy of Designation of Clerk's Record. ec
May 12	Fld mtn & ord (CLK) gntg appellee an ext of time to file the answering brief to: 6-17-81. bbm
June 19	Filed orig & 15 Appellee's briefs. 6/17 ec
Jul 6	Filed orig & 15 Aplt's Reply briefs 7/1 ec
JULY 13	FILED as of 10/29/80 CERT RECORD ON APPAL IN TWO VOLS, PLDGS, VOL I copy R/T VOL II orig ONE ENVELOPE OF EXHIBITS pv
Nov 5	ARGUED TO: CANBY, NORRIS, CJJ, SMITH, DJ. Submission is delayed until the Court decides whther add'l statements from the parties are necessary. ss
Nov 5	Filed order (IN LA) (CANBY, NORRIS & R.E. SMITH*) submission of the case will be delayed until the Court decides whether or not it needs further statements from the parties regarding the exemption regulation of the Freedom of Information Act. Parties will be notified of either the submission of the case or the need for additional statements. -db-
Nov 5	Filed order (CANBY, NORRIS & SMITH*) the Government is invited to submit a brief memorandum on or before Nov. 18, 1981 directed to the following points; (see case file). Aplt's may submit a brief written response to the Government's memorandum on or before Nov. 25, 1981. -db-
Nov 17	Filed aple's supplemental memorandum pursuant to court's order of Nov. 5, 1981. (panel) 11/16 -db-
Nov 27	Filed orig & 5 aplt's supple memorandum in response to aple's supplemental memorandum. (11/24) (panel) ogm
1982	
Sept 21	ORDERED OPINION FILED & JUDGMENT TO BE FILED & ENTERED. ogm

DATE	FILINGS-PROCEEDINGS
1982	
Sept 21	FILED OPINION—REVERSED & REMANDED (SMITH, Dissenting). ogm
Sept 21	FILED & ENTERED JUDGMENT. ogm
Oct 5	Filed Appellee's motion to extend time to file for reconsideration and/or rehearing and/or rehearing en banc to Oct. 12, 1982. (Panel) 10/4 ogm
Oct 7	Filed Appellee's motion for an additional 21 day ex- tension of time within which to file a petition for rehear- ing or a suggestion for rehearing en banc. (Panel) 10/6 ogm
Oct 15	Filed order (CANBY, NORRIS & SMITH*) upon due consideration, aple's mtn for a 21-day ext of time within which to file a petition for rehearing or a sug- gestion for rehearing en banc is granted. -db-
Oct 26	Filed Orig & 33 Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc. (Panel, Active Judges) 10/25 ogm
Oct 26	Received 15 add'l appellee's briefs previously filed on 6/19/81. ogm
Dec 3	Filed Order (CANBY, NORRIS, CJJ & SMITH, DJ) The Petition for Rehearing is DENIED and the sugges- tion for rehearing en banc is REJECTED. ec
Dec 13	MANDATE ISSUED
Dec 16	Filed appellee's motion to recall mandate. 12/15 (panel) ec
Dec 27	Filed order (CANBY, NORRIS, CJJ & SMITH, D.J.) The government's motion to recall the mandate and with- hold its reissue for thirty (30) days following the recall is granted. pn

DATE	FILINGS-PROCEEDINGS
1983	
Feb. 3	Filed appellee's mtn to withhold mandate. (TO PANEL) bbm 2-2-83
Feb 10	Filed Order (CANBY, NORRIS & SMITH) The government's motion to withhold issuance of the mandate for a period up to including February 25, 1983 is granted. -ho-
Mar 1	Filed as of Feb. 25, USA third motion to withhold issuance of the mandate. (Norris) 2/24 -rmc-
March 9	Filed order (CANBY, NORRIS, CJ, & SMITH, DJ) The government's third motion to withhold issuance of the mandate for a period up to and including April 4, 1983 is GRANTED. pn
Mar 12	MANDATE ISSUED
April 14	Received, as of 4/8/83, SC notice of filing of petition for cert on 3/31/83, SC#82-1616. pn
July 1	FILED CERTIFIED COPY OF SC order of 6/27/83, granting cert. (COPIES TO PANEL) pn

JACQUES E. SOIRET  
KIRTLAND & PACKARD  
626 Wilshire Boulevard  
Los Angeles, California 90017  
(213) 624-0931

Attorneys for Plaintiff  
WEBER AIRCRAFT CORPORATION

LAWRENCE J. GALARDI  
1901 Avenue of the Stars, Suite 1631  
Los Angeles, California 90067

Attorney for Plaintiff  
MILLS MANUFACTURING CORPORATION

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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No. 79 02883 WPG (PX)

WEBER AIRCRAFT CORPORATION, an unincorporated  
division of WEBER KIDDE AND COMPANY, INC.;  
MILLS MANUFACTURING CORPORATION, PLAINTIFFS

-vs-

UNITED STATES OF AMERICA, DEFENDANTS

[Filed Jul. 31, 1979]

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COMPLAINT PURSUANT TO 5 U.S.C. 552,  
AND THE FREEDOM OF INFORMATION ACT

Plaintiffs, by and through their attorneys, KIRTLAND  
& PACKARD and LAWRENCE J. GALARDI, ESQ., as  
and for their complaint herein, allege:

I

WEBER AIRCRAFT CORPORATION is an unincorporated association whose principal place of business is the State of California. MILLS MANUFACTURING CORPORATION is a New York corporation whose principal place of business is the State of North Carolina.

The records, reports, documents and material sought herein are located within the jurisdiction of this Court and are under and subject to the control of defendant in this jurisdiction. This action is brought pursuant to 5 U.S.C. 552, and the Freedom of Information Act.

## II

Plaintiffs in this action, WEBER AIRCRAFT CORPORATION and MILLS MANUFACTURING CORPORATION, are also presently defendants in a suit for damages brought by Richard Hoover, Captain, United States Air Force, Retired, as a result of injuries which he sustained during an ejection from an Air Force F-106 B aircraft on October 9, 1973, using a parachute allegedly designed by WEBER AIRCRAFT CORPORATION, and utilizing a canopy allegedly manufactured by MILLS MANUFACTURING CORPORATION.

## III

Captain Hoover, in his action against WEBER AIRCRAFT CORPORATION and MILLS MANUFACTURING CORPORATION, contends that his accident was caused by, *inter alia*, WEBER AIRCRAFT CORPORATION's failure to properly design said parachute, and MILLS MANUFACTURING COMPANY's failure to properly manufacture said canopy.

## IV

Plaintiffs are informed and believe and therefore allege that they have a valid defense to this action against them by Captain Hoover, but are unable to determine the cause of said accident in order to properly present such defense.

## V

As a result of said accident, the United States Air Force conducted an investigation of said accident and the cause thereof. Plaintiffs are informed and believe



that said investigation included testimony of witnesses and the opinions, conclusions, findings and recommendations of the investigation board. Said information is and has been compiled into a document known as the Air Force Accident Investigation Report and consists of a report of information, facts and documentary evidence. The report is now in the possession and custody of the Deputy Inspector General for Inspection and Safety, United States Air Force, Norton Air Force Base, County of San Bernardino, State of California.

## VI

Plaintiffs herein, through their counsel, requested a complete copy of said report by letters dated September 1, 1977 and September 6, 1977, which copy was to be provided at plaintiffs' expense. Plaintiffs' letters are attached hereto and designated as Exhibits "A" and "B", respectively. Major General, Richard E. Merkling, Commander, Air Force Inspection and Safety Center, Norton Air Force Base, denied plaintiffs' request for a copy of said report in part by letter dated September 30, 1977 and a letter to Kirtland & Packard date illegible, attached hereto and designated Exhibits "C" and "D", respectively. Major General Merkling excised the investigating board's opinions, conclusions, findings and recommendations, statements of witnesses and certain medical data concerning Captain Hoover from said report.

## VII

This decision to withhold release of portions of said report was appealed to the Secretary of the Air Force by plaintiffs' counsel by letter dated November 25, 1977, attached hereto and designated Exhibit "E". The Deputy Administrative Assistant to the Secretary of the Air Force, Eldon L. McColl, affirmed the denial of release of said portions of said report with one minor exception in his letter dated February 1, 1977, attached hereto and designated Exhibit "F".

## VIII

Plaintiffs have exhausted all administrative remedies available and are authorized to file this Complaint by the Freedom of Information Act, 5 U.S.C. 552.

## IX

The report requested and sought is available under the Freedom of Information Act, 5 U.S.C. 552, the denial by the United States Air Force of access to the entirety of said report being a violation of the provisions of said Act. Pursuant to the provisions of said Act, this Court should enjoin the United States Air Force and the Deputy Inspector General for Inspection and Safety, Norton Air Force Base, from withholding any portion of said report and its exhibits for examination and copying by plaintiffs herein, at plaintiffs' expense, and plaintiffs herein seek an order compelling the production, inspection and copying of the entirety of said report and its various attachments and related documents and materials.

## X

Plaintiffs further seek and request priority on this Court's calendar pursuant to 5 U.S.C. 552(3).

WHEREFORE plaintiffs pray:

1. For an order enjoining the United States Air Force and the Deputy Inspector General and Inspection and Safety, Norton Air Force Base, from withholding any portion of the Air Force Accident Investigation Report, compiled in connection with the accident identified in plaintiffs' complaint and for an order requiring and directing the production of the entirety of said report and all exhibits thereto for examination and copying at plaintiffs' expense.

2. For assignment of a date for hearing at the earliest practicable date.

3. For costs of suit, and;

4. For such other and further relief as to this Court seems just and proper.

DATED: June 29, 1979.

JACQUES E. SOIRET  
KIRTLAND & PACKARD

By /s/ Jacques E. Soiret  
JACQUES E. SOIRET  
Attorneys for Plaintiff  
Weber Aircraft Corporation

DATED: June 29, 1979.

LAWRENCE J. GALARDI, ESQ.

By /s/ Lawrence J. Galardi  
LAWRENCE J. GALARDI  
Attorney for Plaintiff  
Mills Manufacturing  
Corporation

EXHIBIT "A"

Law Offices

LAWRENCE J. GALARDI  
A Professional Corporation  
Suite 163  
1901 Avenue of the Stars  
Century City  
Los Angeles, California 90067  
(213) 553-1300

September 1, 1977

Air Force Inspection  
and Safety Center  
Norton Air Force Base  
California 92409

Re: Control No. F106/73-10-9-1; S/N FM 57-2527;  
Life Sciences Portion of Air Force Accident In-  
vestigation Report, Air Form Form 711-GA  
Made in Connection with Crash of F106B Air-  
craft on October 9, 1973; Tyndall Air Force  
Base, Florida

Dear Sirs:

You are hereby requested to furnish a copy of the Life Sciences portion of the Air Force Accident Investigation Report referenced above made in connection with the investigation of the subject crash. This request is made in accordance with 5 USC 552, et. seq.

Please be advised that Captain Richard Hoover, the pilot of said aircraft, has filed suit in the United States District Court for the Central District of California seeking damages for injuries sustained in said crash. The filing of said suit constitutes a waiver in accordance with the provisions of 5 USC 552(a), and the herein-

above described portions of the Life Sciences Report, are therefore requested.

If you will forward a copy to this office together with a statement of charges for furnishing said copy, remittance will promptly follow. You are further requested to insure the legibility of all portions of the copy furnished.

Thank you very much for your courteous and prompt attention.

Sincerely yours,

/s/ Lawrence J. Galardi  
LAWRENCE J. GALARDI

LJG:fd

bcc: Marshall Silberberg, Esq.

EXHIBIT "B"

September 6, 1977

Control No. F106/7310-9-1

Air Force Inspection and Safety  
Center  
Norton Air Force Base, CA 92409

Re: Hoover vs. Weber

Gentlemen:

The undersigned currently represents Weber Aircraft Corporation in litigation brought by Richard Hoover, Captain, United States Air Force, Retired, as a result of injuries which he sustained during an ejection accident which occurred on October 9, 1973.

It has come to our attention that the Air Force maintains statistics and studies in relation to injuries incurred during parachute ejection accidents, under Control Number F106/7310-9-1. I would respectfully request that you forward to the undersigned all studies and statistics relating to injuries during parachute ejections during the period 1970 up to and including the present, along with all photographs which may be part of said reports. Any and all costs will be paid by the undersigned.

Should there be any problems with this request please contact the undersigned at your earliest convenience.

Thank you for your courtesy and cooperation.

I remain,

Very truly yours,

KIRTLAND & PACKARD

MARSHALL SILBERBERG

MS:nf

## EXHIBIT "C"

DEPARTMENT OF THE AIR FORCE  
Headquarters Air Force Inspection and Safety Center  
Norton Air Force Base, California 92409

[SEAL]

REPLY TO

ATTN OF: SERR

30 SEP 1977

SUBJECT: Request for Life Sciences Data from F-106B  
Aircraft Accident Report, 9 October 1973

TO: Mr. Lawrence J. Galardi  
Suite 1631  
1901 Avenue of the Stars  
Century City  
Los Angeles, California 90067

1. This is in response to your letter of 1 September 1977, requesting Captain Hoover's life sciences data contained in the subject report.

2. Attached is a copy of the factual portions of that section of the report. Much of the information contained in the life sciences form (AF Form 711gA) is exempt from disclosure under the Freedom of Information Act, Public Law 90-23.

a. Some of the information is based on the opinions, conclusions, findings and recommendations of the investigation board. Those portions are withheld under 5 U.S.C. 552(b)(5). The release of such information would have a stifling effect on the free and frank expression of ideas, opinions and recommendations between Air Force officials.



b. Other sections of the form contain information which is obtainable only from the testimony of unsworn witnesses. Each witness was promised that his statements would be used solely for accident prevention and that they would not be released for any other purpose. The promise of confidentiality is made to induce the witness to tell the board everything he knows about the accident even though his statement may be against his personal interest. Such testimony and the direct or implied references to it are withheld under 5 U.S.C. 552(b) (4) and (5).

c. The social security numbers have been deleted under 5 U.S.C. 552(b) (6). Disclosure of this information would result in a clearly unwarranted invasion of personal privacy.

3. The decision to withhold release of portions of this mishap report may be appealed in writing to the Secretary of the Air Force within 45 days from the date of this letter. Include in your appeal any reason for reconsideration you wish to present and attach a copy of this letter. Address your letter as follows: Secretary of the Air Force, through HQ AFISC, Norton Air Force Base, California 92409.

4. Federal regulations require that search and reproduction costs for the attached material be assessed to the requesting party. The total fee is \$4.90. Please make your check payable to ADSN 5036, AFO Norton AFB, CA, and forward it to HQ AFISC/DA, Norton Air Force Base, California 92409.

5. If we may be of further service, please advise.

/s/ Richard E. Merkling  
RICHARD E. MERKLING  
Major General, USAF  
Commander

1 Atch  
Accident Report

V. PERSONAL, SURVIVAL, AND ESCAPE		
DESIGNATION AND MODEL DESIGNATION	DE. QUANTITY	AVAIL. ADULT
CLOTHING (Boots, gaiters, shoes, gloves, hood, underwear, etc.)		
Coveralls CWU-21/P	X	X
Helmet-custom fit (Wright-Patterson)	X	X
Boots combat	X	X
Gloves flying, summer FRP-1	X	X
Visor, single tinted	X	X
Underwear, civilian	X	X
OTHER WEAR MBU-5/P	X	X
OTHER EQUIPMENT F 2400	X	X
LIFE VEST LPU-31P	X	X
LIFE RAFT LRU-31P	X	X
SURVIVAL RADIO RT-10	X	X
SIGNALING DEVICES		
Beacon personnel locator IIR-27	X	X
Flare signal MK-13	X	X
Signal kit A/P 25S-1	X	X
Whistle police	X	X
Minor signaling	X	X
Dye sea marker	X	X
Strobe light SRM-5/F	X	X
SURVIVAL KIT (Consistent) 140000-24A	X	X
OTHER SURVIVAL GEAR Vest survival SRM-21P	X	X
Bag sleeping	X	X
Kit roll repair	X	X
Manual survival AFM 84-9	X	X
Matches	X	X
Kit first aid Part I & II	X	X
Repellent, insect	X	X
Knife survival pocket	X	X
Bag water 3 qt	X	X
Rations, General purpose	X	X
Chinment sun	X	X
Foil aluminum	X	X
Kit desalting	X	X
Tourniquet	X	X
Kit, minimum survival SRM-16/P	X	X
RESTRAINTS (See Boats, shoulder harness, leg restraints)		
Lsp Belt, MBU-48/A	X	X
Shoulder harness, restraint	X	X
PARACHUTE SYSTEMS Deployed P/N 85C13U	X	X
C-V Canopy	X	X
PARACHUTE SAFETY RELEASE J-1	X	X
PARACHUTE OPENING/DEPLOYMENT DEVICES		
drogue run P/N	X	X
SEAT TYPE Weber - Rocket	X	X

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## EXHIBIT "D"

DEPARTMENT OF THE AIR FORCE  
Headquarters Air Force Inspection and Safety Center  
Norton Air Force Base, California 92409

REPLY TO

[SEAL]

ATTN OF: SERR

Request for Information from F-106B Accident Report, 9 October 1973 and Studies Involving Parachute Ejection Injuries

Kirtland & Packard  
ATTN: Mr. Marshall Silberberg  
626 Wilshire Boulevard  
Los Angeles, California 90017

1. This is in response to your letter of 6 September 1977 and telephone conversations with Mr. Hellman and Captain Bowley (Reports Branch) on 12 and 26 September 1977, requesting information regarding parachute ejection injuries and a copy of the subject accident report.

2. Attached is a copy of the factual portions of the safety investigation report. Those portions exempt from the Freedom of Information Act, Public Law 90-23, are:

a. The investigating board's opinions, conclusions, findings and recommendations are not releasable. This information is exempt from disclosure under 5 U.S.C. 552(b)(5). It may be withheld under the statute and regulations because the release of such information would have a stifling effect on the free and frank expressions of ideas, opinions, and recommendations between Air Force officials.

b. The statements of witnesses giving unsworn testimony before the investigating board are not releasable, nor are direct or implied references to such testimony or statements. Each witness was promised by testifying that his testimony would be used solely for accident prevention and would not be used for any other purpose. This promise of confidentiality is to induce the witness to tell the board everything he knows about the accident even though his statement may be against his personal interest or possibly incriminating. Such testimony is exempt under 5 U.S.C. 552(b)(4) and (5). Statements are retained in confidence as they are essential to an effective investigation.

c. The medical data are exempt from release under 5 U.S.C. 552(b)(6), as are the social security numbers of individuals referred to in the report. Disclosure of this information would result in a clearly unwarranted invasion of personal privacy. However, Capt. Hoover has authorized the release of his medical data to litigants in this action: the factual portions are in Tab H of the report. Those portions which have been excised are exempt under the provisions of the code quoted above.

3. The decision to withhold release of portions of this mishap report may be appealed in writing to the Secretary of the Air Force 45 days from the date of this letter. Include in your appeal any reason for reconsideration you wish to present and attach a copy of this letter. Address your letter as follows: Secretary of the Air Force, through HQ AFISC, Norton Air Force Base, California 92409.

4. As requested, available studies and statistical data are also attached. Attachment 4 con-

tains narrative description of several mishaps. References to the specific mishap have been deleted. This was done because information in the narratives is based upon findings and conclusions of the board or is derived from witness statements or testimony. Additional factual data from the specific reports is included if it was available.

5. Federal regulations require that search and reproduction costs for the attached material be assessed to the requesting party. The total fee is \$55.55. If glossy prints are required, add \$1.25 for each print to the above amount and they will be forwarded as soon as possible. Please make your check payable to ADSN 5036, AFO Norton AFB, CA, and forward it to HQ AFISC/DA, Norton Air Force Base, California 92409.

6. In addition to the safety investigation, a collateral investigation was conducted by the Staff Judge Advocate regarding the subject accident. The report of that investigation is not maintained at this headquarters. For information contained in the collateral investigation report, contact the Staff Judge Advocate, Headquarters Aerospace Defense Command, Peterson Air Force Base, Colorado 80914.



7. If we may be of further service, please advise.

[Illegible]

5 Atch

1. Safety Report

2. F-106 Aircraft

Ejections

3. Life Support

Experience

4. Life Sciences

Narratives

5. USAF Escape System

Experience

## EXHIBIT "E"

November 25, 1977

Richard E. Merkling  
Major General, United States  
Air Force Commander  
DEPARTMENT OF THE AIR FORCE  
Headquarters Air Force  
Inspection and Safety Center  
Norton Air Force Base, California 92409

RE: Request for statistics and studies of injuries  
incurred during parachute ejection accidents  
relevant to Captain Hoover's accident of Oc-  
tober 9, 1973

Dear General Merkling:

Thank you for the information you sent in regard to our request for information as of September 6, 1977. The information that was sent is generally helpful.

However, we are appealing the fact that some relevant information was not sent. We feel that there was some material that was deleted that is vitally needed which we are entitled to receive. As you may recall, my written request for "all studies and statistics relating to injuries during parachute ejections during the period 1970 up to and including the present, along with all photographs which may be part of said reports."

The checklist and index to the U.S.A.F. Accident/ Incident Report indicates that there is some information that is considered not applicable. This information includes: AF Forms 711a, d, e, f, 781 series, and rebuttals. We would like to know why this information is considered not applicable. We would appreciate your identifying each item by topic and subject matter, and an explanation as to why it is not applicable. Your ex-

planation as to the specific content of this material will help us decide whether it would continue to be in the interest of our client to proceed with our appeal as to each of the items that have been specified.

We are also appealing the deletion in Attachment Four of the F-106B mishap on 9 October 1973. As you are aware, this is the information which is most relevant to the lawsuit at hand which involves the pilot and our client.

One reason for appealing the deletion in Attachment Four is that it is necessary in order to show that it contradicts Captain Hoover's deposition testimony. There is case authority to permit such information for this purpose. See *Pilar v. S. S. Hess Patrol* (D. Md. 1972) 55 Federal Rules Decisions 159.

Another reason for appealing the deletion in Attachment Four is that our client should have the benefit of the information available when it was fresh and which only statements made close to the accident date can provide. See *McFadden v. Avco Corp.* 278 F.Supp. 57 (MDA LA. 1967).

A further reason as to why this information should be provided is that any privilege that may exist has already been waived. Air Force officials have already provided our client with Air Force investigation material concerning the landing of Captain Hoover. The Air Force's voluntary disclosure of any such information waives any such claim of privilege to the same information in the future. See *O'Keefe v. Boeing*, (SDNY 1965), 38 F.R.D. 329.

We also are appealing the failure to provide us with any information that we are unaware of which you may have that would be relevant to our request for information on September 6, 1977.

Thank you for your anticipated attention and assistance in this matter.

Very truly yours,

KIRTLAND & PACKARD

By \_\_\_\_\_

MARSHALL SILVERBERG

DL/MS:rp

Enclosure

cc: Secretary of the Air Force

## EXHIBIT "F"

DEPARTMENT OF THE AIR FORCE  
Washington 20330

OFFICE OF THE SECRETARY

[SEAL]

Mr. Marshall Silberberg  
Kirtland & Packard  
Sixth Floor  
626 Wilshire Blvd  
Los Angeles, CA 90017

Dear Mr. Silberberg:

This is in response to your letter of 25 November 1977. Although not addressed to the Secretary of the Air Force, it has been processed as an appeal, under the Freedom of Information Act, from the action of Major General Richard E. Merkling, Commander, Air Force Inspection and Safety Center (AFISC), dated 11 October 1977. General Merkling addressed your previous request for information on parachute mishaps, particularly the one of 9 October 1973, involving an ejection from an F-106B aircraft, in which Captain Richard D. Hoover was injured.

The Office of the Secretary of the Air Force has considered your appeal, and I have determined that it should be granted in part and denied in part.

To the extent that you have appealed the denial of portions of the accident report, I have determined that General Merkling's previous action was proper, with the following exceptions. Portions of five (5) pages of the Life Sciences Report contain unprivileged, factual material which may be released. These pages are attached. The balance of the mishap report must be denied for the reasons previously stated.

You have made special note of the partial denial of the Life Sciences Report in the above described mishap. You may, if you have not already done so, wish to obtain blank copies of all the pages of AF Form 711gA which

make up the Life Sciences Report. This will assist you in putting our disposition of this form in context. The form consists, in the main, of blanks which the Life Sciences member(s) of the mishap investigation board completes with appropriate letters or numbers. Much of this material has been released to you. Those portions denied are the subjective non-factual evaluations of the Life Sciences officer, or the nonsegregable factual material which came directly from witness statements. Seven pages of narrative (pp 11-11.6), consisting of the same type of information (deliberative, predecisional material, or summaries directly from witness statements) have been withheld for the same reason.

Life Sciences officers, like all aircraft mishap safety board members, are aware that aircraft mishap safety reports are conducted solely for flight safety purposes and used only within the Air Force to preclude future mishaps. Because of this practice, investigators feel more disposed to assess blame, and to speculate as to causes of mishaps and resulting damages and injuries. The disclosure of such opinions and deliberations outside the Air Force would inhibit future investigators from furnishing their complete and candid appraisals.

Similarly, witnesses are assured that their statements and testimony concerning a mishap will be used solely for accident prevention and not disclosed outside the Air Force. Thus, witnesses are encouraged to come forward, and to disclose all information they have, even if it is against their personal interest or the interests of their close associates. The disclosure of these witness statements, or information directly derived from them, would break faith with the witnesses and effectively dry up this source of information in the future.

For the above reasons, investigators' deliberations are exempted from mandatory public disclosure under 5 U.S.C. 552(b)(5), and witness statements are exempted under 5 U.S.C. 552(b)(4) and (b)(5). *Brockway v Dept of the Air Force*, 518 F.2d 1184 (8th Cir. 1975); *Rabbitt v Dept of the Air Force*, 401 F. Supp. 1286

(S.D. N.Y. 1974); *Therault v United States*, 395 F. Supp. 637 (C.D. Ca. 1975); *Cooper v Dept of the Navy*, 396 F. Supp. 1040 (M.D. La. 1975) *aff'd*, 558 F.2d 274 (5th Cir. 1977). We have considered the *McFadden v Avco* case and *Pilar v S.S. Hess Patrol* case, cited in your letter. However, in view of our substantial need to protect the withheld portions of the report, we rely upon the more recent case law cited above. We do not agree that, in making a partial disclosure of the report, in compliance with the Freedom of Information Act, we have waived our right to withhold the nonreleasable portions.

You have inquired why certain tabs in the report were labeled "not applicable". This is because the index, AF Form 711h, is a general form used for all types of mishap reports. The tabs listed as not applicable in this case were simply not a part of this report. They were not withheld from you.

In addition to the releasable portions of the mishap safety report, AFISC sent you other information on parachute mishaps. Should you require further information or have questions about this information, you may, of course, consult with AFISC. You should attempt to be more specific than "all statistics and studies," as this term is too broad to permit a meaningful search.

To the extent that documents responsive to your appeal have been denied, you are advised that this is the final action by the Air Force on your appeal. The Freedom of Information Act, 5 U.S.C. 552, provides for judicial review of this determination.

Sincerely,

/s/ Eldon L. McColl  
 ELDON L. MCCOLL  
 Deputy Administrative Assistant

1 Attachment  
 Releasable Portions of  
 AF Form 711gA



ANDREA SHERIDAN ORDIN  
 United States States Attorney  
 FREDERICK M. BROSI0, JR.  
 Assistant United States Attorney  
 Chief, Civil Division  
 JAMES STOTTER II  
 Assistant United States Attorney  
 1100 United States Courthouse  
 312 North Spring Street  
 Los Angeles, California 90012  
 Telephone: (213) 688-2449  
 Attorneys for Defendant

UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA

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No. CV 79-02883-WPG (Px)

WEBER AIRCRAFT CORPORATION, an unincorporated  
 division of WEBER KIDDE AND COMPANY, INC.;  
 MILLS MANUFACTURING CORPORATION, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

---

ANSWER TO "COMPLAINT PURSUANT TO  
 5 U.S.C. 552 AND THE FREEDOM OF  
 INFORMATION ACT"

For their answer, defendant admits, denies, and alleges as follows:

*FIRST DEFENSE*

The Court lacks jurisdiction over the subject matter of the action in that these documents plaintiffs seek fall

within the exemptions to 5 U.S.C. § 552, set forth as 5 U.S.C. § 552(b).

### *SECOND DEFENSE*

In answer to the numbered paragraphs of plaintiffs' Complaint, defendant admits, denies, and alleges as follows:

I. In answer to the first and second sentences, defendant is without knowledge of information sufficient to determine the truth or falsity of said allegations, and on that ground denies said allegations. In answer to the third sentence of said paragraph defendant admits that the Aircraft Mishap Safety Report is maintained by the United States Air Force Inspection and Safety Center at Norton Air Force Base, California. Except as admitted, each and every allegation in said third sentence is denied. In answer to the fourth sentence of said paragraph, it is denied as a conclusion of law.

II, III, and IV. Defendant is without sufficient knowledge and information upon which to form a belief as to the truth or falsity of said allegation and basing its denial on that ground denies each and every allegation therein contained.

V. Admitted except that it is alleged that the United States Air Force has two types of aircraft investigations applicable to the subject accident; the Aircraft Accident Investigation conducted pursuant to Air Force Regulation No. 110-14, dated July 18, 1977, and the Aircraft Accident Safety Investigation conducted pursuant to Air Force Regulation No. 127-4, dated October 24, 1975. The Safety Investigation conducted pursuant to Air Force Regulation No. 127-4 is maintained at the United States Air Force Inspection and Safety Center at Norton Air Force Base, California.

VI. Admitted.

VII. Admitted.

VIII. Admitted.

IX. Denied.

X. Denied as a question of law.

WHEREFORE, Defendant having fully answered, respectfully prays that this action be dismissed with prejudice, that the defendant be awarded its costs incurred herein, and for such other and further relief as the Court may deem just and proper.

DATED: This 18th day of January, 1980.

ANDREA SHERIDAN ORDIN  
United States Attorney  
FREDERICK M. BROSI, JR.  
Assistant United States Attorney  
Chief, Civil Division

/s/ James Stotter II  
JAMES STOTTER II  
Assistant United States Attorney  
Attorneys for Defendant

## MOTION FOR SUMMARY JUDGMENT

The defendant, United States of America, by and through its undersigned attorneys, moves this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that the documents sought by plaintiffs are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (b) (5). The United States is therefore entitled to summary judgment as a matter of law.

This motion is based on the pleadings on file with the Court, the Memorandum of Points and Authorities in Support of said Motion and the Affidavits of Major General Walter Reed, the Judge Advocate General, United States Air Force and Major General Len C. Russell, Commander, Air Force Inspection and Safety Center, United States Air Force, as well as any other matters and documents which may be brought to the attention of the Court at the time of the hearing of said motion.

DATED: This 2nd day of May, 1980.

ANDREA SHERIDAN ORDIN  
United States Attorney  
FREDERICK M. BROSI, JR.  
Assistant United States Attorney  
Chief, Civil Division

/s/ James Stotter II  
JAMES STOTTER II  
Assistant United States Attorney  
Attorney for Defendant

## INDEX OF DOCUMENTS CONTAINED IN THE USAF ACCIDENT REPORT

- TAB A—AF Form 711, USAF Accident/Incident Report  
by Colonel Joseph W. Rogers, dated 8 November 1973
- TAB C—AF FORM 711b, Air Force Accident/Incident  
Report
- TAB D—AF Form 711c, Aircraft Maintenance/Material  
Report
- TAB H—Two AF Form 711gA, Life Science Report of  
an Individual Involved in an AF Accident/  
Incident
- TAB J—Individual Flight Records
- TAB K—Flight Plan Forms
- TAB L—DD Form 365, Weight and Balance Clearance  
Form F
- TAB M—Certificate of Damage and Cost
- TAB N—Transcript of Recorded Communications
- TAB O—Any Additional Substantiating Data Reports
- TAB P—Statement of Damage to Private Property
- TAB Q—Other AF Forms
- TAB R—Diagrams (fallout-impact area, etc.)
- TAB S—Unsatisfactory Materiel Reports
- TAB T—Teardown Deficiency Reports
- TAB U—List of Technical Orders not Complied With
- TAB V—Statements of Witnesses
- TAB X—Orders Appointing Investigating Board
- TAB Y—Board Proceedings
- TAB Z—Photographs

# INDEX OF WITHHELD DOCUMENTS CONTAINED IN THE USAF ACCIEDNT REPORT

TAB A—AF Form 711, the Attachments entitled Investigation, Analysis, Findings, and Recommendations

TAB H—Pages 2, 7, 8, 10, 11.1, and 11.4-11.6 and portions of pages 4, 5, 6, 9, 11, 11.2, and 11.3 which are the opinions, recommendations and discussions of the Life Science member concerning Captain Richard D. Hoover. The Life Sciences Report on Captain Wayne G. Brown is withheld in its entirety.

TAB V—Statements of Witnesses: Captain Richard D. Hoover (two statements)  
Captain Wayne G. Brown  
2nd Lt Byron J. Little  
2nd Lt. John G. Harris  
Major Thomas R. Gainer  
TSgt Harvey R. Pickelsimer  
Major Wilfred G. Hammett  
Captain William R. Flannagan  
Mr. Sam Coxwell

TAB Y—Board proceedings including statements by:  
Captain Wayne G. Brown  
MSgt Murray R. Dixon  
ALC Sammie R. Dickson, Jr.  
Major Thomas R. Gainer

WEBER AIRCRAFT CORPORATION, ET AL., PLAINTIFFS

UNITED STATES OF AMERICA, DEFENDANTS

AFFIDAVIT OF THE COMMANDER  
AIR FORCE INSPECTION AND SAFETY CENTER  
UNITED STATES AIR FORCE

COUNTY OF SAN BERNARDINO )  
 ) ss  
STATE OF CALIFORNIA )

Len C. Russell, Major General, Commander, Air Force Inspection and Safety Center, United States Air Force, being first duly sworn, says:

1. As the Commander, Air Force Inspection and Safety Center, United States Air Force, I am responsible for planning, directing, and evaluating Air Force Inspection and Safety Programs. The singularly most important facet of the Air Force safety program is the aircraft mishap investigations which are conducted pursuant to Air Force Regulation 127-4 and which are conducted for the purposes of enhancing flying safety and preventing future aircraft mishaps within the United States Air Force. United States Air Force Aircraft Mishap Investigations and Reports are prepared for use only within the United States Air Force for the sole purpose of accident prevention.



2. After careful consideration of the various effects of releasing United States Air Force Aircraft Mishap Reports, the Air Force determined not to permit the use of these reports for any purpose other than flight safety. This is true even within the Air Force. This policy has been in effect for over twenty-five years.

3. I am aware of the pending litigation, as described in the caption of this affidavit, which arose as a result of the crash of the F-106B aircraft on 9 October 1973. I am also aware that the United States District Court for the Central District of California is considering the plaintiff's complaint to compel production of certain documents relating to this mishap, and I am aware that these documents are contained in the Aircraft Mishap Report. Those records are all clearly marked "For Official Use Only. (This is a privileged document not releasable in whole or part to persons or agencies outside the Air Force without the express approval of the Secretary of the Air Force.)" These records contain conclusions, speculations, findings and recommendations made by the Aircraft Mishap Investigators, as well as by other Air Force personnel involved in the aircraft mishap investigation, and the testimony provided by witnesses under a pledge of confidentiality.

4. For the reasons hereinafter set forth, the release of the withheld portions of the Aircraft Mishap Investigation for litigation purposes would be harmful to our national security. The strength of the United States Air Force, upon which our national security is greatly dependent, is seriously affected by the number of major aircraft accidents which occur. The successful flight safety program of the United States Air Force has contributed greatly to the continuously decreasing rate of such accidents. The effectiveness of this program depends to a large extent upon our ability to obtain full and candid information on the cause of each aircraft accident. Much of the information received from persons giving testi-

mony in the course of an aircraft mishap investigation is conjecture, speculation and opinion. Such full and frank disclosure is not only encouraged but is imperative to a successful flight safety program. Open and candid testimony is received because witnesses are promised that for the particular investigation their testimony will be used solely for the purpose of flight safety and will not be disclosed outside of the Air Force. Lacking authority to subpoena witnesses, accident investigators must rely on such assurances in order to obtain full and frank discussion concerning all the circumstances surrounding an accident. Witnesses are encouraged to express personal criticisms concerning the accident.

5. I firmly believe that a promise given by the United States Air Force in good faith should be no less honored than a promise given by any other agency of the United States of America.

6. If aircraft mishap investigators were unable to give such assurances, or if it were felt that such promises were hollow, testimony and input from witnesses and from manufacturers in many instances would be less than factual and a determination of the exact cause factors of accidents would be jeopardized. This would seriously hinder the accomplishment of prompt corrective action designed to preclude the occurrence of a similar accident. This privilege, properly accorded to the described portions of an United States Air Force Mishap Report of Investigation, including those portions reflecting the deliberations of the Investigating Board, is the very foundation of a successful Air Force flight safety program.

7. In a study of the instant question, it was determined that during 1950, the year in which an agency was first created within the Air Force for the specific purpose of decreasing the number and effect of aircraft mishaps, 665 Air Force aircraft were destroyed in aircraft mishaps. In 1979, the destroyed aircraft total was reduced to 83. In 1950, there were 781 aircraft mishap fatalities. In

1979, the total number of aircraft mishap fatalities was reduced to 77. Of course, no pecuniary value can be placed on the lives of pilots and crewmembers saved by this reduced accident rate, but the salutary effect of this on the national security is plainly evident.

8. This trend of reduced accident rates is not a statistical phenomenon which accompanies an increase in flying hours. To the contrary, during a previous rapid expansion of flying prior to and during World War II, accident rates increased tremendously. The Air Force has found that reduced accident rates are directly attributable to an aggressive flight safety program. Reports of United States Air Force Mishap Investigation Boards are a most significant and important part of the flight safety program.

9. My legal adviser has consulted with me concerning the complaint to compel disclosure of the documents withheld from the plaintiffs. To release the withheld portions of the report would be directly contrary to the security of this nation which is so much dependent on the continued safety of flight within the United States Air Force.

10. I declare under penalty of perjury that the foregoing is true and correct. Executed on 25 Feb. 80.

/s/ Len C. Russell  
LEN C. RUSSELL  
Major General, United States  
Air Force  
Commander, Air Force Inspection  
and Safety Center

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

Civil Action No. 79-02883  
WPG (PX)

WEBER AIRCRAFT CORPORATION, *et al.*, PLAINTIFFS

*v*

UNITED STATES OF AMERICA, DEFENDANTS

---

AFFIDAVIT OF THE JUDGE ADVOCATE GENERAL  
UNITED STATES AIR FORCE

COUNTY OF ARLINGTON)

) SS

COMMONWEALTH OF )

VIRGINIA )

Major General Walter D. Reed, The Judge Advocate General, United States Air Force, having been duly sworn says:

The general purpose and scope of this affidavit is to explain the action in making available in part and withholding in part an USAF Accident/Incident Report which is in the files of the Department of the Air Force. Reference will be made in this affidavit to the following regulatory publications:

Air Force Regulation 110-5, dated 28 May 1976, entitled "Releasing Information for Litigation and Appearance of Witnesses Before Civilian Courts and Other Tribunals." It pertains to the release of official Air Force information for litigation purposes and is Attachment 1.

Air Force Regulation 127-4, dated 1 January 1973, entitled "Investigating and Reporting US Air Force Accidents and Incidents." This regulation sets forth the purpose and limitations on the use of mishap reports. Air Force Regulation 127-4 is Attachment 2.

Air Force Regulation 110-14, dated 18 July 1977, entitled "Investigations of Aircraft and Missile Accidents." This regulation provides for investigations of accidents to obtain and preserve available factual evidence for purposes other than aviation safety. Air Force Regulation 110-14 is Attachment 4.

Air Force Regulation 127-4, dated 16 January 1978, Attachment 3, is the current regulation. The quotations hereinafter referred to are from the regulation in effect at the time of the investigation, Air Force Regulation 127-4, Attachment 2. The regulatory publications of the Secretary of the Air Force listed above have the force and effect of law. The USAF Accident/Incident Report generated under AFR 127-4, which is the subject of the complaint, consists of an Air Force Form 711h, USAF Accident/Incident Report checklist and index with tabs. These tabs are more fully described in the Index of the USAF Accident/Incident Report which is Attachment 5. The parties in this litigation have been furnished with all documents contained in the USAF Accident/Incident Report other than those described in Attachment 6.

Aircraft and missile accident investigations are conducted in major accidents pursuant to AFR 110-14 to obtain and preserve all factual information for use in claims, litigation, disciplinary action, adverse administrative proceedings and all purposes other than accident prevention and aviation safety. The parties to this litigation have been provided with the entire Aircraft and Missile Accident Report of Investigation pertaining to the F-106B aircraft crash, which occurred on 9 October 1973.

In addition to conducting an investigation of an aircraft accident under Air Force Regulation 110-14, the Air Force prepares USAF Accident/Incident Reports, which are specifically referred to in Air Force Regulation 127-4 as privileged documents for use solely within the Air Force in the interest of accident prevention. They are, thus, intra-agency memoranda. The withheld documents described in Attachment 6 are marked "For Official Use Only. (This is a privileged document not releasable in whole or part to persons or agencies outside the Air Force without the express approval of the Secretary of the Air Force.)"

The Secretary of the Air Force, in publishing Air Force Regulation 127-4, promulgated the most stringent protection against disclosure of USAF Accident/Incident Reports. Indeed, release of aircraft mishap reports to the public or to litigants would violate the very purpose for which the information contained in such reports was compiled in that it would have a serious adverse effect on the flying safety program and the Air Force.

The investigation of aircraft mishaps, a major aspect of the Air Force flight safety program, has contributed greatly to the sustained decreasing rate of accidents involving Air Force aircraft and the attendant loss of life. The success of this program depends in great measure on the ability of the Investigating Flying Safety Officer and Board of Officers to obtain full information as to the cause of any aircraft accident. The investigating officers and boards have no subpoena powers to compel testimony and, therefore, promise witnesses that their testimony will be used solely for the purpose of flight safety and that it will not be released to persons outside the Air Force. In the mishap investigations of all USAF aircraft mishaps conducted under the provisions of Air Force Regulation 127-4, complete assurance is given to any witness testifying or otherwise producing evidence that such testimony or evidence cannot be used in any other legal or administrative proceeding. This assurance

is given to persons who testify to encourage them to talk freely and frankly about aircraft mishaps so that the Air Force may discover possible hazards and prevent future accidents. The Air Force must be able to keep its promise of privilege and, in the instant case, I suggest there is a strong public interest in protecting that promise.

Where the Air Force has obligated itself in good faith not to disclose documents or information it receives, it should be able to honor such obligations.

The deleterious effect of releasing the deliberations, speculations, opinions, etc., of the Board members, including the Life Sciences member, is clear. The Board members must be able to speculate freely, to analyze every conceivable cause of the aircraft mishap and to recommend corrective action. They must be able to do this without concern for possible lawsuits, disciplinary action, and exposure of their conclusions and opinions to public scrutiny. They must have only one objective in these investigations—aviation safety.

When one considers the variety of information in the files of the Department of the Air Force and the possibilities of harm from unrestricted disclosure, the usefulness, indeed, the necessity, of a centralized statement of policy as to the releasability of information is obvious. Hence, it was appropriate for the Secretary of the Air Force, pursuant to the authority given him by the Congress in 10 U.S.C. 8012, to prescribe regulations not inconsistent with the law for the custody, use, preservation, and release of records, papers and property pertaining to the Department of the Air Force. He did so by promulgating Air Force Regulations 110-5, 110-14, and 127-4. Those regulations set forth the policy of the Secretary of the Air Force as to those documents within the control of the Department of the Air Force which are to be made available to persons involved in litigation proceedings. My discretion in making the determination discussed below is restricted by the limits set forth by the Secretary



of the Air Force. The Secretary's written policy, contained in Air Force Regulation 127-4, is as follows:

These reports and their attachments will not be released to the Department of Justice, any United States Attorney, or any other person for litigation purposes in any legal proceeding, civil or criminal, except . . . Notwithstanding the restrictions on the use of these reports and their attachments and the prohibitions in this regulation against their release, factual material, included in the accident/incident reports, covering examination of wreckage, photographs, maps, transcripts of air traffic communications, weather reports, maintenance records, crew qualifications, and like nonpersonal evidence may be released as required by law or pursuant to court order or upon specific authorization of The Judge Advocate General after consultation with The Inspector General . . . .

With a view toward achieving substantial justice, Air Force Regulation 127-4 was intended to strike a balance between the competing interests. The policy of the Secretary of the Air Force, as expressed in Air Force Regulation 127-4, weighs these interests and attempts to reconcile the conflicts: On the one hand, absolute non-disclosure of the contents of the USAF Accident/Incident Report in the interests of furthering the Air Force flight safety program by encouraging full and frank disclosure of all accident information; and, on the other hand, disclosure of factual data to litigants in civil actions when required by law or court order, upon specific authorization from The Judge Advocate General.

A distinction has been made between fact and opinion, conjecture and speculation. This has resulted in supplying the parties with the Aircraft or Missile Accident Investigation Report conducted under Air Force Regulation 110-14, and other factual information relating to the aircraft accident from which this litigation arose. The

only documents withheld, which are a small percentage of the total, are those described in Attachment 6.

I have been designated to make determinations of the releasability of official Air Force records and documents by order of the Secretary of the Air Force, as contained in Air Force Regulations hereinbefore mentioned. Pursuant to this authority, and in the course of my official duties, I have carefully examined the documents described in Attachment 6, and I have also consulted with The Inspector General, United States Air Force.

Having given careful consideration to the plaintiffs' complaint and to the impact of the production of the documents described in Attachment 6, I have determined that the production of the said documents or any portion thereof not already furnished the litigants would be prejudicial to the efficient operation of the Department of the Air Force and would not, therefore, be in the best interests of the nation.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 4 Feb 1980.

/s/ Walter D. Reed  
WALTER D. REED, MAJOR GENERAL  
United States Air Force  
The Judge Advocate General

DEPARTMENT OF THE AIR FORCE  
Headquarters US Air Force  
Washington DC 20330

AF REGULATION 110-5

28 May 1976

Judge Advocate General Activities

RELEASING INFORMATION FOR LITIGATION AND  
APPEARANCE OF WITNESSES BEFORE CIVIL-  
IAN COURTS AND OTHER TRIBUNALS

This regulation covers release of official Air Force information for litigation purposes, and guides Air Force military and civilian personnel appearing as witnesses. It does not apply to release of official information to courts-martial or administrative boards convened by United States Military authorities. Air Force personnel who have custody of official information requested for use in litigation, or who are requested to appear as witnesses, must comply. This regulation appears as 32 C.F.R. 840.

1. Terms Explained:

a. Official Information. All documents, records, or papers in the custody of the Air Force and its personnel, and factual matters within the knowledge of Air Force personnel, prepared or obtained in the performance of official duties.

b. Litigation. Lawsuits, hearings, investigations or similar proceedings in civilian courts, commissions, boards or other tribunals.

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Supersedes AFR 110-5. 22 August 1969. (For summary of revised, deleted, or added material, see signature page.)

OPR: JAC.

DISTRIBUTION: F

2. Air Force Policy. Official factual information is made available for use in litigation, and Air Force personnel are permitted to testify concerning official factual information, unless the information is classified or privileged. Records exempted from public disclosure by 5 U.S.C. 552(b) are not required to be released, but Air Force policy is to release them if no significant purpose is served by withholding them (see AFR 12-30). Records in a system of records may not be disclosed if prohibited by 5 U.S.C. 552(a) (see AFR 12-35).

3. Who Is Responsible. The Staff Judge Advocate is responsible for the release of information for use in litigation if the United States is a party or the information requested would aid a claim or litigation against the United States. If he considers such action necessary, he may refer matters to The Judge Advocate General for decision. The Judge Advocate General may authorize the release of information or testimony of witnesses in civil litigation. Requests for official information for use in a foreign criminal court must be forwarded for action to The Judge Advocate General HQ USAF/JACI.

4. Limitations on Release of Information:

a. When the United States is a party to existing litigation, release information relevant to the litigation only when authorized by one of the following:

- (1) The Staff Judge Advocate.
- (2) The Judge Advocate General.
- (3) The United States Attorney General or an appropriate United States Attorney.

b. HQ USAF/JACL/JACC/JACI or /JACP, as appropriate, will be immediately advised of all information which is released by a Staff Judge Advocate or upon authorization of The Attorney General or an appropriate United States Attorney.

c. Custodians who receive requests for information that might aid in a claim or litigation against the United

States should consult the staff judge advocate. He may approve release of the request, consult The Judge Advocate General about it, or forward it to an appropriate authority to deny the request, as specified by AFRs 12-30 and 12-35.

d. When the United States is not party to the litigation and the requested information does not appear to aid a claim or litigation against the United States, custodians may release information not classified or privileged as provided by AFRs 12-30 and 12-35.

e. Information of a personal nature from a system of records subject to the Privacy Act of 1974 may be released only under the conditions specified in AFR 12-35.

f. Classified defense information is not released to courts or unauthorized persons under any circumstances unless the classification is removed by proper authority. If classified information is subpoenaed and cannot be declassified at lower levels, notify The Judge Advocate General. Pending his decision, the person on whom the subpoena is served answers the subpoena and informs the court of the restrictions of this paragraph.

5. Fees and Charges. Persons releasing copies of records to non-Government requesters collect fees and charges under AFR 12-30 or 12-32, as appropriate.

6. Sending Requests. When requesting a decision or release of information from The Judge Advocate General, provide the information below, if it is readily obtainable:

- a. Name of litigation and parties
- b. Name and (illegible)
- c. Date the litigation began and date of requested appearance.
- d. Name and address of requester, and of party from whom the request was made.
- e. Type of action, subject matter, and a statement of the relevancy of the requested information.
- f. Copies of documents requested, or a complete description of them if they are bulky or numerous.

g. Recommendations on release, and any other pertinent information.

7. Requests for Depositions or Statements. Requests by parties to prospective or actual litigation not involving the United States, for statements or depositions of Air Force personnel concerning matters connected with their official duties may be granted, provided this regulation is followed. Staff judge advocates will give legal advice as needed. Statements and depositions are voluntary with the individual concerned, unless required by valid legal process or the order of competent military authority.

8. Authentication of Documents. Official Air Force documents used in civil litigation are authenticated by certificate, rather than by the personal appearance and testimony of the custodian, wherever practicable. The authentication procedure in AFR 110-10 meets the requirements of Federal courts and of most State courts and administrative bodies. Use the simplest authentication procedure permissible.

9. Release to the Department of Justice. Department of Justice, through the United States Attorneys, represents the Government's interest in all litigation involving the Air Force. Unclassified information that is not privileged should be released to the Department of Justice or the United States Attorney on request. Requests for classified information that cannot be declassified at lower levels, or for privileged information, are sent to The Judge Advocate General for decision.

10. Release to Government Contractors. Contracting Officers may grant requests from Government contractors for information for use in contractor litigation. Comply with this regulation and AFR 110-24.

## 11. Compliance With Subpoena:

a. Staff judge advocates give legal advice to Air Force personnel subpoenaed to appear and testify concerning official information. When release of the subpoenaed information is prohibited by this regulation, the person receiving the subpoena appears and explains the matter to the court. If the court is not satisfied and persists in requesting the information, the witness respectfully asks for time to send the question to The Judge Advocate General for decision. Judge advocates are authorized to accompany and advise the witness concerning a problem on release of official information.

b. When a subpoena is served which calls for information which is classified or otherwise determined to be not releasable, staff judge advocates are authorized to communicate with counsel who requested the subpoena, explain the restrictions on release, tender releasable information, and suggest withdrawal of the subpoena.

c. A subpoena which is defective for improper issue or service, or for lack of jurisdiction, is treated as a routine request for release of information.

d. Subpoenas from foreign courts requiring the production of records, files or documents will be reported expeditiously to HQ USAF/JACI.

## 12. Witnesses in Private Litigation:

a. Air Force personnel who are requested to appear and testify in private litigation in which the Government has no interest may be authorized to do so, if this regulation does not prohibit release of the requested information, and if there is no expense to the Government.

b. Expenses are arranged between the witnesses and the party requesting his appearance. If absence exceeds normal pass privileges, the witness takes regular or annual leave. Commanders should be as liberal as practicable in granting leave for this purpose.



### 13. Witnesses in State Criminal Proceedings:

a. Air Force personnel who are subpoenaed to appear and testify in state criminal proceedings may be granted permissive temporary duty, as provided by AFR 35-26, at no expense to the Government.

b. Expenses must be arranged between the witness and the party who subpoenaed him.

### 14. Witnesses in Litigation Involving the United States. In these instances, the following rules should be followed:

a. When United States attorneys or foreign counsel employed by the Department of Justice request the attendance of witnesses, and no temporary duty is required, honor the request if practicable. HQ USAF/JACL/JACC/JACI or /JACP, as appropriate, should be advised of all such requests.

b. When United States Attorneys request the attendance of witnesses and temporary duty is required, ask the United States Attorney to request the witness through the Administrative Division, Department of Justice. HQ USAF/JACL or /JACC, as appropriate, directs travel.

c. In hospital recovery litigation, honor requests by counsel assisting in the hospital recovery claim if practicable, when no temporary duty is required. If temporary duty is required, comply with AFM 112-1.

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil No. CV 7410064WPG

RICHARD D. HOOVER, PLAINTIFF

v.

WEBER AIRCRAFT CORPORATION,  
A CORPORATION, ET AL., DEFENDANTS.

AFFIDAVIT AND CLAIM OF PRIVILEGE  
BY THE SECRETARY OF THE AIR FORCE

COMMONWEALTH OF VIRGINIA)

) SS

COUNTY OF ARLINGTON )

Thomas C. Reed, being first duly sworn says:

1. I am the Secretary of the Air Force, a military department within the Department of Defense, and Executive Head of the Department of the Air Force, an agency of the Executive Branch of the Government of the United States of America.

2. I have been advised that the United States District Court for the Central District of California is considering the Defendants' motion to compel production of certain documents regarding the crash of a F-106 aircraft which occurred on 9 October 1973 near Tyndall Air Force Base, Florida, and resulted in the injury of the pilot of the aircraft, Captain Richard D. Hoover.

3. The four documents which are the subject of the motion to produce in this litigation were prepared in accordance with Air Force Regulation 127-4 and were

either extracted from or directly discuss findings and recommendations contained in the Aircraft Accident Report, hereinafter referred to as the AAR, regarding this particular crash.

4. I am aware of the contents of these four documents which are fully described in the affidavit of Major General Harold R. Vague, The Judge Advocate General of the Air Force. I am also aware that the parties to this litigation have been provided with the factual information regarding this unfortunate mishap.

5. For the following reasons, and with great reluctance, I feel compelled to formally invoke a claim of privilege to protect these four documents from disclosure. As Executive Head of the Department of the Air Force, I have a deep responsibility to protect the lives and welfare of the men and women who serve our nation in the United States Air Force, as well as to insure that our Air Force maintains the strongest posture possible. The sole purpose of the AAR is to determine information which can be used as a basis for corrective action for the prevention of such mishaps in the future. Lt. General Donald C. Nunn, The Inspector General of the Air Force, in his affidavit fully describes the dramatically reduced aircraft accident rate within the Air Force. The Air Force considers its flight safety program as being directly responsible for this significantly improved aircraft accident rate and the AAR is an indispensable part of its flight safety program.

6. I have given careful thought and consideration to the request of the litigants to produce the four documents and to the question of whether such production would be prejudicial to the efficient operation of the Department of the Air Force, the defense interests of the nation, and the public interest. I recognize that there are competing interests relative to the disclosure of documents and information contained in the AAR. But the overriding consideration should be that Air Force personnel who risk their lives operating aircraft on the fringe of scien-

tific achievement under adverse weather conditions should not be requested to do so without the benefit of the best aviation safety program available.

7. In order to obtain complete and candid information as to the circumstances surrounding an aircraft mishap, witnesses who give statements for an AAR are advised that their statements will be used solely for flight safety purposes. They understand that their statements, which often contain opinions and speculations as to the possible accident cause factors, are privileged and may not be disclosed except to authorized persons in the course of their duties. The aircraft accident investigators appeal to each of the witness' personal concern for the safety of others, promising secrecy. In some instances, persons are persuaded to make disclosures clearly against their interest or the interests of others. Release of the summary of the testimony of the witnesses in this case would set a precedent which would effectively dry up a vital source of information because the promise of confidentiality would no longer be enforceable.

8. Furthermore, under the present rules, Air Force personnel involved in accident investigations feel more free to assess blame, especially where allegations of negligence are involved, because they know their opinions will be seen only by persons within the Air Force whose duties are to promote flight safety. The disclosure of such opinions and deliberations in public proceedings would hamper the single-minded objectivity which Air Force personnel must carry out in aircraft accident investigations.

9. I have concluded that production of the four documents not furnished the litigants would prejudice the efficient operation of the Department of the Air Force and the defense interests of the United States, and would be contrary to the public interest, and, hence, would not be warranted. Accordingly, pursuant to the authority vested in me as Secretary of the Department of the Air Force, I assert the privileged status of the four docu-

ments described in the Affidavit of Major General Harold R. Vague and, therefore, respectfully decline production of those documents sought by the parties to this litigation. I also request that the Attorney General of the United States of America take all action necessary and appropriate to bring this claim of privilege to the attention of the Court and to defend the privilege here asserted.

/s/ Thomas C. Reed  
THOMAS C. REED,  
Secretary of the Air Force

Subscribed and sworn to this  
19th day of July 1976.

(Name illegible)  
Commission expires: 8-1-77

## CERTIFICATE OF SERVICE BY MAIL

I, Laura M. Murphy, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on May 2, 1980, I deposited in the United States mails in the United States Courthouse at 312 North Spring St., Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of NOTICE OF MOTION FOR SUMMARY JUDGMENT; MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT with EXHIBITS A, B, C, AND D.

addressed to

Jacques E. Soiret	Lawrence J. Galardi
Kirtland and Packard	1901 Avenue of the Stars
626 Wilshire Boulevard	Suite 1631
Los Angeles, CA 90017	Los Angeles, CA 90067

at their last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on May 2, 1980 at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Laura M. Murphy

## REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California,  
Monday, August 4, 1980, 10:00 A.M.

THE CLERK: Item 19, civil 79-2883, Weber v. United States. Hearing re defendants' motion for summary judgment.

MR. STOTTER: James Stotter for the United States, your Honor, and the moving party.

THE COURT: Yes.

MR. GALARDI: Lawrence Galardi for the plaintiff Mills Manufacturing.

MR. SILBERBERG: Marshall Silberberg of Kirtland & Packard for Weber.

THE COURT: I have read the papers thoroughly. I have some tentative conclusions. The first is that this comes under Section 5 of the Freedom of Information Act in that it is an inter-agency or intra-agency memorandum that would not be available to a party other than in litigation with the agency.

With respect to the matter of public policy and executive privilege, as I have earlier indicated, I think there are very valid reasons, on the one hand, why the plaintiffs would like to have this report in order to impeach Captain Hoover and Major Ranone and anybody else whose depositions they have or who may have testified before that committee, but, on the other hand, the reasons for the government's saying to these people that testified before this committee, "Whatever you say is in confidence and, therefore, you can level with us because our main desire is to prevent further accidents," I think that is a very valid policy, and I think it covers this case like a blanket.

I have great sympathy for the plaintiffs' position. Certainly, if I were going to be the defendant in the Hoover action. I would love to have the opportunity to see anything that Captain Hoover said. The same thing is true with Ranone, and I can understand the plaintiffs' concern



lest the government try to make things easy for Captain Hoover and in this action place the blame on Weber or one of the other defendants. But I just cannot see the validity of upsetting that policy of the government getting witnesses to level with them with the understanding that they won't be seeing what they say before this commission in litigation either against them or in litigation which is contrary to the position that they took.

I am about to grant summary judgment.

Does anybody want to be eloquent?

MR. GALARDI: If you Honor please, Lawrence Galardi for the plaintiff Mills. I will try to be brief. I am not sure that I can be eloquent.

THE COURT: You always are, Mr. Galardi, but I don't think you are going to win this uphill battle.

MR. GALARDI: I would begin that in the McFadden vs. Avco case the Court find the government's position taken here sterile and patently offensive to suggest that the only way the Air Force—the Army in McFadden—was able to encourage or indeed solicit truth from Army personnel was by promising them that whatever they said would not at some later time be disclosed. That is indeed patently offensive. And I think that the dialogue that Judge Speers in San Antonio—your Honor will recall that we had occasion on an order to show cause in connection with a subpoena—

THE COURT: I read what you said about it.

MR. GALARDI: Yes, your Honor.

I think that dialogue probably is most apropos here. We are searching for the truth. We do not deal here with national security interests.

In the Theriault case, your Honor, we had some atomic scientists who were on an Air Force airplane observing atomic tests in the vicinity of a foreign power, and that airplane mysteriously disappeared, and I suggest that perhaps there in Theriault it was indeed a question of national security interests.

But here we have no such concern. Here we are looking at a situation seven years after the fact involving an

ejection from a F-106B aircraft. All of the material that we are dealing with is in the public domain. No one is going to be harmed or in any way prejudiced other than the defendants unless the material is not in fact disclosed.

And the inconsistencies are so patent that they cry out for disclosure here. If we are not indeed entitled to the so-called conclusions of the AIB, I submit we should be entitled to the various documents that were made a part of the report. I suspect that those documents have already been submitted to the Court for in camera inspection.

THE COURT: Not that I am aware. Not that I am aware.

If they are part of this—are these the ones that were tendered and then taken back?

MR. GALARDI: In part, yes, your Honor.

THE COURT: Well, as to that, if they were covered by the case that you—by your complaint, then the exception pertains to them anyway.

If it is a matter of—

MR. GALARDI: You mean there would be no waiver?

THE COURT: Yes. If it is a matter of—is it a matter of waiver?

MR. GALARDI: O'Keefe vs. Boeing, your Honor, I think was dispositive of that issue. O'Keefe is a time-honored case decided sometime when I was back in Washington. O'Keefe made it clear that what we are looking at, O'Keefe or McFadden or indeed here, is the element of essential fairness.

In O'Keefe The Boeing Company had the Air Force report and the Court said, "Well, you just can't give it to one party and not the other."

THE COURT: Yes.

MR. GALARDI: You can't permit, for example, as here Major Ranone testified with regard to conclusions that are inapposite to what the Air Force concluded to go before the jury and say, "Here is Major Ranone. He is

in his blue suit. Here is what they concluded," when everyone knows that isn't true.

THE COURT: It does seem to me that Major Ranone should not be permitted—if Major Ranone is to testify—if he testifies, it does seem to me that the present plaintiffs ought to be entitled to have the testimony that he gave before that commission.

What about that, Mr. Stotter?

MR. STOTTER: your Honor, the Air Force has never denied any access to any witness in a deposition or trial. Major Ranone can testify to everything he knows factually.

THE COURT: Yes, but suppose he said something different before this commission.

MR. STOTTER: That may be, your Honor, but to allow the statement that he made before the commission to be released is to destroy the whole pattern of aircraft accident investigation. This is one of the things that happens. As a matter of practicality, we can imagine a man going in to the Accident Investigation Board, testifying as to how an accident occurred, going across the street to the court martial investigation and either invoking the Fifth Amendment privilege or giving a completely different story.

There are two tribunals. One is for his punishment or review of any violation of statute or military law and the other is the investigation of accidents.

And for the last ten years, and—

THE COURT: I read all that, Mr. Stotter.

MR. STOTTER: And you agreed with it. What I am saying is I agree with your Honor.

Specifically what about Major Ranone? He is no different than any other witness that testified before the board. The fact that the man testifies before the board does not preclude these parties or any party from taking his deposition or making any investigation they want.

THE COURT: All right.

MR. GALARDI: If your Honor please.

THE COURT: Mr. Galardi.

MR. GALARDI: Your Honor, we have not been precluded from deposing Major Ranone.

THE COURT: What?

MR. GALARDI: Or indeed Airman Samuel Dickson. I urge today, and while this might sound rather harsh, there is a very real probability here that Dickson perjured himself somewhere.

Now, he testified in the deposition proceedings in the related litigation, in the underlying litigation, Hoover vs. Mills and Weber and others, that he that in fact did not have anything to do with either the upper or the lower disconnect mechanism.

He signed off with regard to having completed the upper disconnect, and we know that during the month that this board concluded its investigation and after it published its findings he was de-certified, he was given a broom, and he never again got close to the life support shop.

We know, too, that Major Ranone was the man that was fundamentally responsible for the failure of the life support shop.

So we have reason to understand, if I may, why it is that he testified the way he did in the litigation and different before the AIB.

With regard to Hoover, we are dealing with the very finite question of proximate cause and competent producing cause, which perhaps is the cause specific, if I may, of how it was that he was injured, and we can impeach his testimony before this Court in the deposition proceedings and before the collateral board.

THE COURT: All right.

MR. GALARDI: Thank you, your Honor.

THE COURT: I can well understand how fairness would indicate that you should have this material.

On the other hand, I can well understand the validity of the policy that says the testimony and the information given at this—whatever hearing we call it—what is that?

MR. STOTTER: Accident Investigation Board.

THE COURT: All right.—is—the mishap report is confidential and will not be used against you.

I can understand how that would be more valuable to these plaintiffs than any given situation.

But I think I end as I began: Having read all the papers, summary judgment will be granted to the government.

MR. STOTTER: Your Honor, we lodged on May 2—it has been a while ago—a proposed judgment and findings of fact.

THE COURT: I will wait five days to sign it. If any of you has any opposition, let me know within five days.

MR. GALARDI: All right, your Honor. In view of the fact that all of the authorities, and I say “all” advisedly, take the position that this is a matter in the Court’s ultimate discretion certainly and recognizing national security interests, nevertheless in many of the cases they have granted the information sought, and in view of the position specifically taken by my client, I fear that we may have to go forward to the circuit on the issue.

THE COURT: I think that would be fine. No offense at all.

MR. GALARDI: Thank you, your Honor.

THE COURT: The is a troublesome issue.

MR. STOTTER: Mr. Rose called me from Philadelphia. He asked me to tell you that he is sorry he is not here. He is with Judge Pregerson in a case in Philadelphia.

THE COURT: All right.

MR. STOTTER: He is not a party. He doesn’t have to be here.

THE COURT: All right.

SUPREME COURT OF THE UNITED STATES

No. 82-1616

UNITED STATES, PETITIONER

*v.*

WEBER AIRCRAFT CORPORATION, ET AL.

ORDER ALLOWING CERTIORARI

Filed June 27, 1983

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

82 - 1616

Office - Supreme Court, U.S.

FILED

JUN 4 1983

ALEXANDER L. STEVAS,  
CLERK

No. ....

IN THE

# Supreme Court of the United States

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October Term, 1982

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UNITED STATES OF AMERICA,

*Petitioner,*

vs.

WEBER AIRCRAFT CORPORATION, *et al.*

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**Brief in Opposition to  
Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit.**

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**STATEMENT OF FACTS**

On October 9, 1973, CAPTAIN RICHARD HOOVER, USAF (hereinafter HOOVER), ejected from a disabled aircraft. As a result of injuries he received upon his impact with the ground, he was rendered a paraplegic.

HOOVER subsequently filed suit, alleging that his injuries were the result of defects in his parachute assembly. WEBER AIRCRAFT CORPORATION (hereinafter WEBER) is one of six defendants in that action from whom HOOVER seeks over \$5,000,000.

WEBER requested that the Air Force produce statements made by HOOVER and Airman DICKSON to the Air Force Accident Investigation Board during its investigation of the accident, and the Air Force refused to produce them, claim-

ing they were exempt pursuant to Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5) (hereinafter FOIA).

As these statements are essential to its defense, for reasons which are set forth below, WEBER filed suit seeking to compel their production. In an unreported decision, the District Court granted summary judgment to the U.S. WEBER appealed, and the Ninth Circuit reversed. *Weber Aircraft Corp. v. United States*, 688 F.2d 638 (9th Cir. 1982) WEBER believes the Ninth Circuit decision to be proper, and opposes the petition for the reasons set forth below.

#### **FACTUAL BACKGROUND.**

WEBER seeks statements made by HOOVER to the President of the Air Force Accident Investigation Board, wherein HOOVER stated unequivocally that he had impacted the ground, landing on his undeployed seat kit. WEBER also seeks the production of the statement of Airman DICKSON, relating to what he did or failed to do during the course of rigging HOOVER's equipment, including the survival kit and automatic deployment assembly which failed to deploy.

As a result of the investigation by the Air Force, it was concluded that the competent producing cause of the injury to HOOVER's vertebra and the related injuries was the failure of the seat survival kit to automatically deploy. R. 113-115. The failure of the seat kit to automatically deploy prevented HOOVER from executing the prescribed parachute landing fall maneuver (hereinafter PLF), causing him to land on the undeployed survival kit that was attached to his pack and harness assembly, in the region of his buttocks and lower extremities.

#### **A. The Conflicting Testimony: HOOVER.**

HOOVER testified before the Collateral Investigating Board (the report of which was voluntarily released to all parties) that he landed on his feet first, and attempted to

execute a PLF and roll. R. 143. He also stated that he was hoping that the survival kit would release and deploy as programmed, but it did not. It is significant that he insisted there that he landed on his feet and attempted to roll to the right. During the course of his deposition testimony given in the related litigation, HOOVER said that he was concerned about making a good PLF; that he covered his face, tucked his arms in, and assumed a PLF position; and that the instant his feet touched the ground, he made a PLF to the right.

However, in a statement made to Colonel Rogers, the President of the Accident Investigation Board, HOOVER said that he raised his knees in a crouch and hit on the survival kit which had failed to automatically deploy.

#### **B. The Conflicting Testimony: DICKSON.**

Airman DICKSON was the parachute rigger who worked on HOOVER's pack and harness assembly when it was last modified prior to HOOVER's utilizing the equipment on October 9, 1973. At that time he was required to disassemble, and thereafter reassemble, the "upper disconnect assembly", which was coincidentally required to be attached to the very speed connector link missing from HOOVER's pack on October 9, 1973. The modification procedure in which Airman DICKSON was involved also required the installation and actuation of what is known as the "lower disconnect assembly". That assembly provided for the automatic deploy of the seat survival kit away from the pilot's body during descent and contact with the ground. It did not function.

During the course of his deposition testimony in the related litigation, Airman DICKSON testified that he had never at any time laid his hands upon or touched or worked with the speed connector link. R. 169-172. There is evi-



dence, however, that he signed the Air Force forms indicating that he had in fact made the "upper disconnect assembly" modification. That involved taking apart the speed connector link associated with the right rear riser and, thereafter, putting it back together again (if done properly). R. 168. Regarding the "lower disconnect assembly", Airman DICKSON testified that he never performed any part of that modification, and that it was in fact accomplished in a so-called assembly line approach. R. 169-172. His superior, during his deposition, denied that.

A substantial portion of the "upper disconnect assembly" was not found. The right rear speed connector link was not found. Minute examination of the related harness and pack assembly revealed no evidence of separation of the link from the webbing during ejection sequence. There is, therefore, a substantial question as to whether Airman DICKSON replaced the right rear speed connector link or, if he replaced it, whether he replaced it properly. Appellants submit that Airman DICKSON may have confessed that he failed to replace the link or otherwise failed to accomplish the procedure. The fact that he testified in his deposition that he never touched these links is supportive of this assumption at this time, as is the fact that after this accident he was relieved of all duties involving parachute rigging.

Further, evidence supplied by government counsel disclosed the existence of five cases involving admissions by unidentified maintenance personnel of improper acts that resulted in major accidents during the period 1971-1973. Airman DICKSON gave a statement to the Accident Investigation Board.

A critical document testified to by Captain Diggs, Mr. Findley, and Major Harrison (all of whom were and are experts in life support equipment) reveals *the Air Force conclusion* that the connector link was missing prior to pack

opening; or, the connector link was not properly locked during accomplishment of a modification during the pack and harness maintenance by Airman DICKSON that last preceded HOOVER's use of the equipment on October 9, 1973. R. 113-115.

Airman DICKSON's evidence given to the Accident Investigation Board, then, is critical to the issue of his credibility, and it is critical to the final determination of the single most critical fact issue in the underlying litigation. The government refuses to produce it.

There is, thus, substantial evidence that HOOVER and DICKSON testified differently to the Accident Investigation Board than they did either in their depositions or before the Collateral Investigating Board. The concealment of the HOOVER and DICKSON statements is what the UNITED STATES petitions this Court to order.

## REASONS FOR DENYING THE PETITION.

WEBER submits that the petition should be denied for the following reasons:

### I.

#### THE PETITION PRESENTS NO JUSTICIABLE CONTROVERSY.

##### A. Petitioner Cannot Show That the Statements Were in Fact Given Pursuant to Any Promise of Confidentiality.

The government's entire petition is based on the allegation that the HOOVER and DICKSON statements were given in response to a promise of confidentiality. The record below amply shows that no such promise can be proved to have been given.

In its motion for summary judgment, the UNITED STATES contended that the Accident Investigation Board's investigation of this accident had been conducted pursuant to Air Force regulation AFR 127-4, dated October 24, 1975, and the court so found. (Petition, p. 22a, Finding 1).

After it was noted during oral argument before the Ninth Circuit that this regulation *postdated* the accident, and the Board, by nearly two years, the Court invited the government to submit a supplemental brief on that issue, *including a reference "to parts of the record, if any, indicating whether promises of confidentiality were made to the witnesses whose statements are sought"* (App. A, *infra*).

The government did submit a supplemental brief (App. B, *infra*), but was unable to identify a single piece of evidence in the record to substantiate its claim that promises of confidentiality had in fact been made. Instead, it referred for the first time to AFR 127-4, dated January 1, 1973, which it now contends in its petition is the correct regulation, and further attempted to establish a general custom and

practice of such assurances being given.

The government attached a portion of AFR 127-4 dated January 1, 1973, to its petition (App. E). It did not advise this Court of the portions of that regulation which disclose what a witness is to be told before he gives a statement. Those portions provide *only* that:

"Witnesses will be advised before they testify that the sole purpose of the investigation is to determine all factors relating to the accident/incident and in the interest of accident prevention, to preclude recurrence."

(App. C, *infra*, at para. 12(c)). Thus, in the regulations that the government now claims applied, there is nothing which requires, or even suggests, that a witness be promised that his testimony will be confidential.

As the government has been unable to produce a scintilla of evidence that HOOVER or DICKSON were promised that their statements would be confidential, the issue as defined in the petition does not arise under the facts before the Court.

**B. Assuming a Promise of Confidentiality Was Given, It Was Waived by Disclosure of the Documents to the Parties in the Underlying Litigation.**

On June 9, 1976, the deposition of John F. Findley, an employee of the United States Air Force, was taken at Kelly Air Force Base, Texas. Pursuant to valid subpoena, Mr. Findley produced a number of documents, which were examined by all counsel present. Those documents contained *verbatim* excerpts from HOOVER's statement, and the conclusion of the Air Force that HOOVER's injuries were caused by *Air Force personnel error* (by implication, the error of DICKSON, the only person to work on the assembly). After HOOVER's counsel had reviewed the documents and apparently realized their devastating impact on HOOVER's

case. HOOVER's counsel "reminded" the Air Force of the alleged confidentiality of those documents. It was only then that the Air Force first asserted the alleged confidentiality of the documents, and confiscated them from the court reporter.

Although the government subsequently asserted that Mr. Findley was not authorized to release the documents, they were released and reviewed by all counsel. Continued protection of these documents will result only in their being hidden from the jury.

**C. Assuming a Promise of Confidentiality Was Given to HOOVER, It Was Waived by Him When He Instituted the Underlying Civil Litigation.**

When, as here, a member of the Air Force initiates civil litigation to recover damages from manufacturers, it is reasonable to conclude that he thereby vitiates any promise of confidentiality given him by the Air Force as to the statements of facts within his personal knowledge made to the Air Force concerning the incident in which he was injured.

It would further appear that when, as here, the plaintiff in the underlying litigation takes the deposition of a member of the Air Force Accident Investigation Board and elicits testimony favorable to himself based on facts learned by the deponent in his capacity as a member of that Board, the taking of the deposition vitiates any promise of confidentiality that may have been made by the Air Force with respect to the subject matter and as to any and all portions of the investigative materials considered by the Board. To conclude otherwise would permit the deponent to testify favorably on behalf of plaintiff in the underlying litigation and would deny defendants in the underlying litigation the opportunity to impeach that testimony or otherwise attack

the credibility of the witness and the probative value of his testimony through the use of other facts disclosed in the investigation but not disclosed to the defendants.

II.

**THE ALLEGED INJURY TO THE GOVERNMENT'S ABILITY  
TO INVESTIGATE ACCIDENTS IS NOT SUPPORTED BY  
THE RECORD.**

The government alleges that release of the HOOVER and DICKSON statements will seriously impair the ability of the military services to gather information needed to prevent aircraft accidents. Petition, p. 8. In support of this allegation, the government below offered the Affidavit of Maj. Gen. Russell, quoted from in the Petition at p. 5. However, nowhere below did the government introduce any factual support for its conclusory and self-serving argument, a fact which was noted by the Court of Appeals:

The government has offered no record support for its conclusory argument that shielding the witness statements at issue would "safeguard the lives of flight crews, enhance the safety of those upon whom aircraft might otherwise fail, and contribute to the national defense."

*Weber, supra*, at 646 fn. 12.

WEBER would also note that the argument asserted by the government is inconsistent with its practice in its identical duty to investigate *civilian* aircraft accidents. The National Transportation Safety Board (NTSB) is required to "[i]nvestigate such accidents and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof", 49 U.S.C. § 1441(a)(2). The NTSB regulations, 49 CFR § 800, *et seq.*, authorize Board representatives to "interrogate any person having knowledge relevant to an aircraft accident," 49 CFR § 831.8, but contain no provision authorizing any promise of confiden-

tiality, let alone a blanket promise such as the government urges is necessary here. On the contrary, the regulations require the disclosure of all information unless the Board expressly orders the information withheld, 49 CFR §§ 801, 831.5, 845.50, and witness statements are routinely released. WEBER is unable to understand what is so different about military aircraft accidents or military witnesses that a blanket promise of confidentiality is required for them when it is not required in similar civilian accidents.

WEBER thus urges this Court to deny the petition, as the alleged injury to the government is not supported by the record and, in any event, is highly suspect.

### III.

#### THE ISSUE OF LAW PRESENTED BY THE PETITION HAS PREVIOUSLY BEEN RESOLVED BY THIS COURT.

In its petition, the government states that the question presented to this Court is "whether confidential statements made by witnesses in an Air Force crash safety investigation are protected from disclosure under Exemption 5 of the Freedom of Information Act." It then alleges that the decision below is in conflict with the decisions in *Cooper v. Dep't. of the Navy*, 558 F.2d 274 (5th Cir. 1977), modified on other grounds, 594 F.2d 484 (5th Cir. 1979), cert. denied, 444 U.S. 926 (1979), and *Brockway v. Dep't. of the Air Force*, 518 F.2d 1184 (9th Cir. 1975).

WEBER asserts that the statutory issue presented was resolved by this Court in *FOMC v. Merrill*, 443 U.S. 340 (1979). Both *Cooper* and *Brockway* were decided before *Merrill*, and to the extent they are inconsistent with *Merrill* are no longer good law. The issue presented here is the application of *Merrill* to a particular factual situation, and is one of first impression among the Circuits.



**A. Merrill Prohibits the Withholding of Information on a Public Interest Standard.**

The government alleges that the decision below will severely prejudice the public interest by somehow impeding its ability to investigate military accidents. This argument was expressly rejected by this Court in *Merrill*.

In *Merrill*, the FOMC argued that release of the information sought would not be in the public interest and could impede the efficiency of its operations. This Court stated:

Such an interpretation of Exemption 5 would appear to allow an agency to withhold any memoranda, even those that contain final opinions and statements of policy, whenever the agency concluded that disclosure would not promote the "efficiency" of its operations or otherwise would not be in the "public interest." This would leave little, if anything, to FOIA's requirement of prompt disclosure, and would run counter to *Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague "public interest" standard.*

*Id.*, at 354 [emphasis added].

The government's public safety argument is thus expressly barred by *Merrill*, and does not justify review by this Court.

**B. Merrill Prohibits the Withholding of Information Pursuant to an Alleged Civil Discovery Privilege Not Recognized by the Congress.**

The government's second allegation is that release of the requested statements is contrary to a civil discovery privilege recognized in *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 (1963). The issue of the interplay between civil discovery privileges and Exemption

5 was also ruled on in *Merrill*.

The FOMC urged this Court to find that all civil discovery privileges were incorporated into Exemption 5. In response, this Court stated:

[W]e note that it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery. . . .

Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5, and death with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution.

*Id.*, at 355.

After recognizing that this Court had previously recognized only two civil discovery privileges in Exemption 5, both “expressly mentioned in the legislative history of that Exemption”, *id.* at 355, this Court examined the legislative history of Exemption 5 and found significant evidence that the Congress had intended to recognize a *limited* exemption for confidential *commercial* information:

[W]e think that the House Report, when read in conjunction with the hearings conducted by the relevant House and Senate Committees, can fairly be read as authorizing at least a limited form of Exemption 5 protection for “confidential . . . commercial information.”

*Id.*, at 357; and:

[W]e think it is reasonable to infer that the House Report, in referring to “information . . . generated [in] the process of awarding a contract,” *specifically contemplated* a limited privilege for confidential commercial information pertaining to such contracts.

*Id.*, at 359 [emphasis added].

This Court has thus recognized Exemption 5 as incorporating only those civil discovery privileges that were specifically contemplated by the Congress.

As the government candidly admits in its petition, "the privilege here in question . . . is not mentioned in the legislative history." Petition, p. 16. Thus, there can be no argument that the Congress specifically intended the *Machin* exemption to fall within Exemption 5, and *Merrill* thus compels a rejection of the government's reliance on the *Machin* privilege.

**C. Merrill Implicitly Overruled the Machin Privilege.**

WEBER would draw this Court's attention to the fact that the government's reliance on the *Machin* privilege in effect constitutes an attempt to bootstrap itself around FOIA and the holding of *Merrill*.

*Machin* was decided in 1963, long prior to the enactment of FOIA. The court stated its reasons for creating the privilege as follows:

We agree with the Government that when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the *efficient operation of an important Government program and perhaps even, as the Secretary here claims, impair the national security* by weakening a branch of the military, the reports should be considered privileged.

*Id.*, at 339 [emphasis added].

As was discussed above, *Merrill* explicitly held that efficiency of government operations and public interest were *not* grounds for non-disclosure under Exemption 5, citing "Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague 'public interest' standard", *id.*

at 354. Thus, this Court has held that Congress explicitly rejected the rationale of *Machin* in its enactment of FOIA and, by implication, that *Machin* is no longer good law.

Rather than admit that the *Machin* privilege is dead, the government now petitions this Court to resurrect it by finding that Congress, when it enacted Exemption 5, specifically intended, without saying so, to preserve a privilege which is based on a rationale it expressly rejected.

**D. The Holdings of Cooper and Brockway Are Inconsistent With Merrill.**

Both *Cooper, supra*, and *Brockway, supra*, were decided prior to this Court's decision in *Merrill*. Both cases relied heavily on the government's argument that the efficiency of its investigations would be hampered and safety endangered, and on the *Machin* privilege.

In *Brockway*, the court stated:

If the statements are disclosed . . . there is the definite possibility that the deliberative processes of the Air Force will be hampered and the efficiency of a specific administrative program reduced.

. . . [W]e hold that on the narrow facts presented here, . . . common sense as reflected in the general law of discovery, *see, e.g., Machin v. Zuckert, supra*, indicates disclosure of these statements would defeat rather than further the purposes of the FOIA and is not required by the language of the FOIA itself.

*Id.*, at 1194.

And in *Cooper*, after favorably citing both *Machin* and *Brockway*, the court stated:

As to the AAR, then, we find reason in the Navy's arguments that breaching its confidentiality would destroy or greatly diminish a highly effective safety program which has saved numerous lives and much

government property. We are not disposed nor does the FOIA require that we decree such consequences in the name of appellant's convenience.

*Id.*, at 278-79.

Both courts thus based their holdings on the efficiency and public interest grounds explicitly rejected by *Merrill*, and on the *Machin* privilege, itself based on those same rejected grounds.

Thus, although the government is correct that the *Cooper* and *Brockway* decisions are inconsistent with the decision below, that inconsistency is not grounds for review by this Court, as the *Cooper* and *Brockway* decisions do not reflect the current law as set forth by this Court in *Merrill*.

#### IV.

#### THE COURT OF APPEALS CORRECTLY DECIDED THE ISSUE BEFORE IT.

##### A. The Court of Appeals Correctly Applied *Merrill* to the Facts of This Case.

In its petition, the government attaches great significance to an alleged misinterpretation of *Merrill* by the Ninth Circuit. WEBER urges that the government's argument is based on semantics, not reality.

In its opinion, the court stated, "As we read *Merrill*, this finding is the linchpin of the Court's analysis: Exemption 5 embraces only those civil discovery privileges *explicitly recognized* in the legislative history." *Weber, supra*, at 642 [emphasis added]. The government contends that the court erred by using the term "*explicitly recognized*", rather than the words "*specifically contemplated*" used by this Court in *Merrill, supra*, at 359.

In making this argument, the government ignores the fact that the "finding" referred to was this Court's determination that Congress "*specifically contemplated* a limited privilege

for confidential commercial information", *Merrill, supra*, at 359, quoted in *Weber, supra*, at 642 in the sentence immediately preceding the holding with which the government takes issue. Also ignored is the subsequent sentence: "Justice Stevens, in dissent, stated without rebuttal that the Court 'proposes . . . that only those privileges that are recognized in the legislative history of FOIA should be incorporated in the Exemption.'" *Weber, supra*, at 642.

The court clearly understood what *Merrill* requires, as it subsequently stated:

The critical step in the *Merrill* analysis involves a search of the FOIA legislative history for evidence that Congress intended Exemption 5 to incorporate an executive privilege for "official government information." Our search convinces us that neither House of Congress intended Exemption 5 to incorporate an executive privilege that protects purely factual material. Indeed, the Senate Report assumes that Exemption 5 would protect only "legal or policy matters." S. Rep. No. 183, 89th Cong., 1st Sess. 9 (1965). Moreover, the legislative history suggests that Congress intended Exemption 5 to encompass factual material which is "inextricably intertwined" with legal or policy matters, but not to protect "memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context." *EPA v. Mink*, 410 U.S. 73, 87-88, 93 S. Ct. 827, 836, 35 L. Ed. 2d 119 (1973).

*Weber, supra*, at 642-43.

As this passage indicates, an examination of the legislative history for Congressional intent, which is what *Merrill* requires, is what was performed.

It is also clear that the results of this examination are not in error, for, as the government states in its petition, at p. 16, "[T]he privilege in question here . . . is not mentioned in the legislative history."

**B. The Court of Appeals Refused to Adopt an Interpretation of Exemption 5 That Would Condone Perjury.**

The Fourth Amendment to the United States Constitution provides every citizen with the privilege that he will not be subjected to unreasonable searches and seizures, and it can be argued that this is an absolute privilege, guaranteed by our very Bill of Rights.

This Court, in *United States v. Havens*, 446 U.S. 620 (1980), held that this privilege, provided by the Fourth Amendment, is not above the law, and, in fact, evidence secured in violation of the Fourth Amendment and suppressed during the course of a trial may be used for the purposes of impeachment.

This Court stressed the importance of arriving at the truth, as well as the defendant's obligation to speak the truth. The Court rejected the notion that the defendant's constitutional shield, *i.e.*, privilege against having illegally-seized evidence used against him, could be "perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances". This Court held, "There is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *Havens, supra*, at 626.

This Court said that it is essential to the proper functioning of the adversary system that when a party takes the stand, the adversary be permitted proper and effective cross-examination in an effort to elicit the truth. A party's obligation to testify truthfully is fully binding on him when he is cross-examined, and the privilege against self-incrimination does not shield a party from proper questioning. Therefore, this Court held that the absolute privilege set forth in the Fourth Amendment is not above the law, the



law being that a party has an obligation to tell the truth, and if that party deviates from the obligation, any and all evidence that might otherwise be privileged is thereafter admissible for the purposes of impeachment.

As was set forth above, the documents which were produced during the Findley deposition clearly disclose the substantial probability that the HOOVER and DICKSON statements will disclose that their subsequent testimony was false. By its petition, the government urges this Court to find that Exemption 5 confers a greater privilege than the Fourth Amendment, a position properly rejected below.

**C. The Decision Below Will Lead to More Just and Equitable Decisions in Actions Arising From Military Aircraft Accidents.**

The decision below allows access by the parties to litigation arising from military aircraft accidents to what is argued by the government to be the most reliable information available as to the circumstances surrounding those accidents. It clearly promotes the "arriving at the truth [which] is a fundamental goal of our legal system", *Havens, supra*, at 626. It will also prevent serious inequities to the parties.

In *Lockheed v. U.S.*, .... U.S. ...., 103 S. Ct. 1033 (1983), this Court allowed third-party indemnity claims against the government arising from the death of or injury to civilian government employees in military aircraft accidents. The decision below will prevent the great inequity which would exist if the government was allowed to suppress, in a lawsuit against it, that which it here argues to be its most reliable evidence about the accident.

And, in *McKay v. Rockwell International Corp.*, .... F.2d .... (No. 81-5540, 9th Cir., Apr. 20, 1983), the Ninth Circuit, in another case arising from a military ejection mishap, stated:

[W]e hold that under the *Feres-Stencel* doctrine and the government contractor rule, a supplier of military equipment is not subject to section 402A liability for a design defect where: (1) the United States is immune from liability under *Feres* and *Stencel*, (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.

(Slip opinion, p. 12).

*McKay* imposed on the contractor the burden of proof as to the four requirements (Slip opinion at p. 18).

The decision below will prevent the grave inequity which would result from the government depriving a contractor of a *McKay* defense by refusing to release its best evidence, as can be illustrated by the facts in the underlying litigation in this action.

In order to meet its burden of proof under *McKay*, WEBER will have to prove that HOOVER's parachute assembly conformed to an approved specification at the time of HOOVER's injury, or that any non-conformity was due to Air Force error in servicing the assembly. The last person to service and reassemble HOOVER's parachute assembly was DICKSON, whose statement about what he did or did not do is the subject of the petition. Thus, DICKSON's statement is crucial to WEBER's defense, and its suppression under Exemption 5 could gravely injure WEBER.

**D. The Decision Below Is Consistent With the Intent of Congress That Facts Concerning Aircraft Accidents Be Publicly Disclosed.**

As has been previously discussed, 49 U.S.C. § 1441 requires that the NTSB publicly report the facts it receives during its investigations. A similar requirement is imposed

on the military by 49 U.S.C. § 1442(c):

(c) With respect to . . . accidents involving solely military aircraft, the military authorities *shall provide* the Administrator and the National Transportation Safety Board with *any information* with respect thereto which, in the judgment of the military authorities, would contribute to the promotion of air safety. [Emphasis added.]

Congress has thus mandated the disclosure by the government to the FAA and NTSB of *any* information it gathers during the investigation of a military aircraft accident that could promote air safety, including, presumably, witness statements which would be subject to the promise of confidentiality at issue here. When coupled with the disclosure requirements of 49 U.S.C. § 1441, the Congressional intent that this information be disclosed is clear. In any event, these statutes are inconsistent with the government's argument here that Congress specifically intended that such statements be completely exempt from disclosure.

#### CONCLUSION.

In summary, the petition is based on an implicit assumption of confidentiality which is not supported by the record. The alleged injury to the government's ability to investigate military aircraft accidents is not supported by the record, and is highly suspect. This Court has already resolved the legal issue raised in *Merrill*, and the court below properly applied *Merrill*. Finally, the decision below will promote a fundamental goal of the legal system by promoting the determination of truth, and by preventing gross inequity.

For these reasons, WEBER respectfully urges this Court to deny the petition or, if this Court is inclined to grant the petition, to summarily affirm the decision below.

Respectfully submitted,

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MARSHALL SILBERBERG,  
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*Attorneys for Plaintiff-Respondent,  
Weber Aircraft Corporation.*

## **APPENDIX A.**

### **Order.**

In the United States Court of Appeals for the Ninth Circuit.

Weber Aircraft Corporation, a division of Walter Kidde and Company, Inc., and Mills Manufacturing Corporation, a corporation, Plaintiffs-Appellants, v. United States of America, Defendant-Appellee. No. 80-5744.

Filed, Nov. 5, 1981.

Before: CANBY and NORRIS, Circuit Judges, and SMITH,\* Senior District Judge.

The Government is invited to submit a brief memorandum on or before November 18, 1981 directed to the following points:

1. a response to the point made by appellants at oral argument that AFR 127-4, requiring that witnesses be advised of the confidentiality of statements made by them to the Accident Investigation Board, did not take effect until after the investigation in this case; the response to include the effect of predecessor regulations, if any; and
2. a reference to parts of the record, if any, indicating whether promises of confidentiality were made to the witnesses whose statements are sought in this case.

Appellants may submit a brief written response to the Government memorandum on or before November 25, 1981.

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\*Of the District of Montana.

## APPENDIX B.

### Appellee's Supplemental Memorandum.

United States Court of Appeals for the Ninth Circuit.

Weber Aircraft Corporation, a division of Walter Kidde and Company, Inc., and Mills Manufacturing Corporation, a Corporation, Plaintiffs/Appellants, v. United States of America, Defendant/Appellee. No. CA 80-5744, D.C. #CV 79-2883-WPG.

At oral argument herein on November 5, 1981, attorney Lawrence J. Galardi raised an issue for appellants apparently not mentioned in their briefs. Upon oral application of appellee's counsel, by Order filed November 5, 1981, the Court therefore invited appellee "to submit a brief memorandum on or before November 18, 1981 directed to the following points:

- "1. a response to the point made by appellants at oral argument that AFR 127-4, requiring that witnesses be advised of the confidentiality of statements made by them to the Accident Investigation Board, did not take effect until after the investigation in this case; the response to include the effect of predecessor regulations, if any; and
- "2. a reference to parts of the record, if any, indicating whether promises of confidentiality were made to the witnesses whose statements are sought in this case."

This is appellee's memorandum, so authorized.

There was an AFR 127-4 *dated 1 January 1973* in effect during the safety investigation which was conducted following the subject air crash of October 9, 1973. This version of the AFR, incorporated in appellee's Motion for Summary Judgment as pages 28-95 (C.R. 10), provides, at least implicitly, that witnesses are to be advised of the confiden-

tiality of statements made to the Accident Investigation Board.

“Witnesses will be advised before they testify that the sole purpose of the investigation is to determine all factors relating to the accident/incident and in the interest of accident prevention, to preclude recurrence.” C.R. 10, page 38.

The witness statements are to be incorporated in, or attached to, reports “prepared by, for, or at the direction of the Inspector General, USAF . . . (which) are, therefore privileged documents.” C.R. 10, page 42. The same page of the 1 January 1973 regulation continues:

- “(1) Reports and investigations . . . made under this regulation will be used only within the USAF to determine all factors contributing to the mishap for the sole purpose of taking corrective action in the interest of accident prevention (see paragraph 20).
- “(2) These reports and their attachments will not be used as evidence nor to obtain evidence for disciplinary action; as evidence in determining the misconduct or line-of-duty status of any personnel; as evidence before flying evaluation boards; as evidence to determine pecuniary liability; or, except as stated in (4) below, as evidence to determine liability in claims against the US Government.
- “(3) These reports and their attachments will not be released to the Department of Justice, any United States attorney, or any other person for litigation purposes in any legal proceeding, civil or criminal, except as stated in (4) below. . . .”

Independently of the 1 January 1973 regulation, there is ample evidence of record that express promises of confidentiality were made to the witnesses whose statements are



sought in this case. The Air Force Judge Advocate General averred that under the regulation "complete assurance is given to any witness testifying or otherwise producing evidence that such testimony or evidence cannot be used in any other legal or administrative proceeding." C.R. 10, page 20. The Commander of the Air Force Inspection and Safety Center declared:

"Open and candid testimony is received because witnesses are promised that for the particular investigation their testimony will be used solely for the purpose of flight safety *and will not be disclosed outside the Air Force*. Lacking authority to subpoena witnesses, accident investigators must rely on such assurances in order to obtain full and frank discussions concerning all the circumstances surrounding an accident. . . . I firmly believe that a promise given by the United States Air Force in good faith should be no less honored than a promise given by any other agency of the United States of America." C.R. 10, page 16, emphasis added.

The policy of the AFR "has been in effect for over twenty-five years." C.R. 10, page 14.

With reference to an accident occurring in the year before the subject Hoover incident, and a safety investigation conducted "shortly after" that crash, the Eighth Circuit, on a record made before the United States District Court for the Northern District of Iowa, found that each safety investigation witness receives "the assurance that the information he imparts to the safety board will be kept confidential and will not be . . . used for any purpose other than accident prevention." *Brockway v. Department of Air Force*, 518 F.2d 1184, 1186 (1975).

The potential for confusion was engendered when appellee placed in evidence below not only the regulation effective 1 January 1973, but also its successor regulation

effective 16 January 1978. One supposes that the later regulation was thought pertinent because, at C.R. 10, page 216, it provides a Witness Statement Format, useful in assuring that each potential witness has been fully advised of the confidentiality which has always been accorded to a safety investigation statement. Appellee sincerely regrets its mistaken reference at footnote 2, page 3 of its brief, to the 1978 regulation, which compounded the confusion.

It has been demonstrated that a pertinent version of AFR 127-4 was in effect during the safety investigation in this case; that the record shows that promises of confidentiality were made to the witnesses whose statements are sought by appellants; and, that the Findings of the District Court (C.R. 21, see particularly p. 3) are therefore correct and supported by the evidence.

DATED: At Los Angeles, California this 16th day of November, 1981.

Respectfully submitted,

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## **APPENDIX C.**

### **Air Force Regulation 127-4, 1 January 1973.**

12. Witnesses. The appearance of witnesses before an investigator or board appointed to investigate an Air Force accident/incident will be governed by the following:

a. The use of truth serums, hypnotic techniques/drugs, or polygraph tests is prohibited in any USAF accident investigation or inquiry.

b. Witnesses will not testify under oath and will not be sworn.

c. Witnesses will be advised before they testify that the sole purpose of the investigation is to determine all factors relating to the accident/incident and in the interest of accident prevention, to preclude recurrence.

Office-Supreme Court, U.S.

FILED

JUN 8 1983

ALEXANDER L. STEVAS,  
CLERK

No. 82-1616  
IN THE

# Supreme Court of the United States

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October Term, 1982

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UNITED STATES OF AMERICA,

*Petitioner,*

vs.

WEBER AIRCRAFT CORPORATION, *et al.*

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**Brief in Opposition to  
Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit.**

---

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**Question Presented.**

Whether the United States Air Force has authority under Exemption 5 of the Freedom of Information Act, (5 U.S.C. 552(b)(5), to withhold non-classified factual witness statements made to an Air Force Safety Investigation Board?

**Parties to These Proceedings.**

Petitioner is the United States of America. Respondents are Weber Aircraft Corporation and Mills Manufacturing Corporation.

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No. 82-1616  
IN THE  
**Supreme Court of the United States**

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October Term, 1982

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UNITED STATES OF AMERICA,

*Petitioner,*

vs.

WEBER AIRCRAFT CORPORATION, *et al.*

---

**Brief in Opposition to  
Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit.**

---

Mills Manufacturing Corporation responds to the Government's Petition for a Writ of Certiorari and suggests the Petition be denied, or, if granted, that the Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

**Preliminary Statement.**

Respondent concurs with Petitioner's Statement of the Opinions below; the matters relating to Jurisdiction and the Statute involved, to wit, 5 U.S.C. 552(a)(4)(B); and, 5 U.S.C. 552(b)(5).

**Background.**

In the pending underlying case styled *Richard D. Hoover v. Weber Aircraft Corporation, etc., et al.*, (CV-74-1064-WPG, U.S.D.C. Central District of California) plaintiff seeks

recovery for damages for injuries sustained when he ejected from an Air Force aircraft after experiencing a flame-out (a complete engine loss, and failure of re-start). Plaintiff, HOOVER sued WEBER and MILLS, the initial designer of the parachute pack and harness assembly, and the manufacturer of the canopy, respectively, along with the designers of the various component parts of the parachute pack and harness assembly. There are five defendants in the related litigation. Each has a serious valid purpose for pressing for disclosure and a direct and substantial interest in the outcome of these proceedings.

WEBER and MILLS sued the United States to compel disclosure under the Freedom of Information Act, 5 U.S.C. 552, et seq. The District Court held the Government was authorized to withhold the documents by Exemption 5, (5 U.S.C. 552(b)(5)), and by traditional equity principles. The Court of Appeals reversed and remanded. A petition for rehearing with a suggestion for rehearing *en banc* was denied with no Judge of the Court requesting a vote thereon; and, Petitioner here seeks certiorari.

### **Respondent's Statement of Pertinent Facts.**

The incident in which the injuries were sustained occurred on October 9, 1973. HOOVER was involved in a routine training mission with a student pilot operating an Air Force fighter aircraft known as an F-106B. Both HOOVER and the student pilot ejected from the aircraft. HOOVER alleges his injuries were caused by failure of his parachute equipment. The student pilot sustained no serious injuries.

The Air Force concluded, during the course of its investigation, that HOOVER's injuries were the result of an "extremely hard parachute landing or undeployed survival kit".

The theories urged in the related litigation range from defective stitching in the parachute pack to fouling of the

pilot chute, fouling the shroud lines, deficiencies in the design and manufacture of the speed connector links, and entanglement. HOOVER has not sued the manufacturer of the aircraft, the manufacturer of the engine, or most significantly here, the designer and manufacturer of the survival kit and related deployment assembly.

Thus electing to not proceed against the designer and manufacturer of the survival kit and automatic deployment assembly appears to be a decision on the part of HOOVER to avoid the issue of *Air Force personnel error* as an intervening and supervening cause of the injuries.

The Air Force documents that bear on the evidence of *Air Force personnel error* are the subject of this appeal.

Petitioner has nowhere urged the training flight or procedures or equipment involved were secret or confidential because of matters of national defense. None of the materials sought deal with matters of national security, and all of the mechanisms and assemblies, the design plans and the manufacturing criteria for the equipment, are in the public domain. There is no issue of commercial privilege.

The investigations of the Air Force were undertaken, completed and reported pursuant to the Air Force regulations discussed and summarized in pertinent part in the Court of Appeals opinion. (Petitioner's Appendix A, pp. 2a-4a and notes 2 and 3.) Neither the regulations relied upon by Petitioner nor the record in the Court below factually support Petitioner's claim that these witness statements were provided after and upon promises of confidentiality. The Court of Appeals invited Petitioner furnish either authority or evidence of Record, on that issue, following oral argument, however, nothing was forthcoming other than reference to the already submitted conclusory affidavits filed in the Trial Court in support of the Motion for Summary Judgment.

The information the Government refuses to disclose are statements made by HOOVER to the Air Force Accident Investigation Board and the President of the Board and the statements of Airman Dickson to the Board relating to what he did or failed to do during the course of rigging HOOVER's equipment. Dickson was the last person to have had anything to do with HOOVER's equipment, including the survival kit and automatic deployment assembly which failed to deploy, before the accident.

The allegedly defective "speed link" has never been found. The rest of HOOVER's parachute equipment, including the other components alleged to be defective, was lost or destroyed by Air Force personnel soon after the accident, and before Respondent or any of the other defendants in the underlying litigation had any knowledge of the accident or any knowledge that HOOVER intended to sue for damages. The defendants in the HOOVER litigation, including Respondent, have therefore never seen and will never be able to see any of the allegedly defective equipment.

The evidence of HOOVER and Dickson given to the Accident Investigation Board is critical to the final determination of the most critical factual issues in the underlying litigation; and, the Government refuses to produce it.

## REASONS FOR DENYING THE PETITION.

### I.

#### **The Court of Appeals Correctly Interpreted and Applied This Court's Decision in *Merrill*.**

Petitioner urges the Circuit Court's interpretation and application of *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979) is "patently erroneous". *Merrill*, however, clearly stands for the rule that Exemption 5 includes only those privileges which are explicitly recognized in the legislative history of the Act. It is equally clear the Court of Appeals thus interpreted *Merrill* and applied that conclusion in rejecting Petitioner's reliance upon *Cooper v. Department of the Navy*, 558 F.2d 274 (5th Cir. 1977), modified on other grounds 594 F.2d 484, cert. den., 444 U.S. 926 (1979); and, *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975).

In applying its analysis of *Merrill* the Court below pointed to reliance in both the Fifth Circuit and Eighth Circuit upon *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. den., 375 U.S. 896 (1963). The *Machin* Court reasoned the civil discovery privilege exempted witness statements given to Aircraft Accident Investigation Boards from disclosure concluding they were unavailable by law and for that reason, the Fifth and Eighth Circuits protected and exempted them by Exemption 5. The Court of Appeals held, however, there was no evidence in the legislative history that Congress intended Exemption 5 to protect the statements of witnesses from disclosure.<sup>1</sup>

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<sup>1</sup>This Court explicitly recognized the assertion of the *Machin* privilege in *Merrill* as one of three theories advanced there and after specifically contemplating both, it flatly rejected one theory (Federal Agencies "general authority" to delay disclosure (443 U.S. at p. 353, 99 S.Ct. at p. 2808)) and concluded the limited commercial privilege set forth in F.R.C.P. 26(c)(7) was the most plausible theory advanced by

Petitioner attacks that rationale and the conclusions of the Court of Appeals and its criticism resolves itself into three arguments. They are: First: Petitioner asserts the Court of Appeals has "twisted" and "distorted" the language of this Court when the Court of Appeals said Exemption 5 includes only those privileges which are "explicitly recognized", rather than utilize this Court's phraseology, "specifically contemplated", by the legislative history; second: Petitioner asserts this Court did not find the limited privilege for commercial information involved in the *Merrill* case to be "explicitly recognized" in the legislative history, but instead, relied upon "inference" and upon "analogy", from the legislative history; and, third: the Court of Appeals erroneously, (according to Petitioner) concluded that under *Merrill* factual information is not subject to any privilege included within Exemption 5. Petitioner asserts the privilege found by this Court in *Merrill* specifically includes purely factual information.

Respondent Mills respectfully urges each of these contentions is wholly incorrect.

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the Government. That limited privilege was included on that basis. The *Machin* argument, however, fairly characterized as "less plausible", was not addressed further. The Court said: "In light of our disposition of this case [Confidential commercial information is protected by F.R.C.P. 26(c)(7) and Exemption 5] we do not consider whether either asserted privilege is incorporated in Exemption 5." 443 U.S. at page 355, fn. 17, 99 S.Ct. at page 2810, fn. 17. Against that background it is, we submit, an overstatement to say this Court "expressly left open the question whether Exemption 5 incorporates the *Machin* privilege;" (the footnote observation of the Court of Appeals relied upon by Petitioner, to the contrary notwithstanding). We do not believe that issue was reached in *Merrill* once reliance upon F.R.C.P. 26(c)(7) was comfortably, clearly and ultimately found to be within Exemption 5.

The footnote reference of the Court of Appeals (Petitioner's Appendix, p. 8a, fn. 6) is clearly a reference to this Court's note 17 in *Merrill*, and as aforesaid, that note indicates only that *Machin* was not reached for decision as the matter was decided on other grounds.



To begin with, in the context of *Merrill* and the instant case, it is impossible as a matter of ordinary English usage to perceive any rational distinction between the phrase "explicitly recognized" and the phrase "specifically contemplated".

We ask the Court consider for the moment a real life circumstance of two attorneys discussing whether their mutual client had thoroughly understood a contract they had reviewed in his behalf. The senior attorney in our example might be heard to inquire "did Mr. Merrill *explicitly recognize* that he may have a substantial exposure to liquidated damages if his deliveries are delayed by bad weather?" Ordinary English usage compels we conclude it would be appropriate for the junior attorney to respond: "Yes, he *specifically contemplated* that possibility." Petitioner's tortuous pursuit of the construction it places on that phraseology would require the junior attorney reply, however: "No, the client did not *explicitly recognize* that possibility, but he did *specifically contemplate* it." The Court of Appeals did not in any sense alter the meaning of this Court's language in *Merrill* when it addressed the legislative history and sought to characterize what the Congress intended to incorporate in Exemption 5 and to suggest otherwise appears to be a mere semantic quibble.

Petitioner is equally in error when it contends this Court did not find explicit recognition of the *Merrill* privilege in the legislative history, but, instead merely relied upon "inferences" and "analogies" drawn from the legislative history. Petitioner relies upon a truncated portion of one sentence from this Court's opinion in *Merrill*, which, Respondent submits, was taken out of context.

The Government's incomplete quotation appears on page 13 of Petitioner's brief. It reads:

“[W]e think it is reasonable to infer that the House Report . . . specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts.” (Verbatim from Petition, page 13.)

The actual context, however, in which Petitioner’s abbreviated quotation appears, is as follows:

At 443 U.S. 357-359, this Court mentioned in substantial detail that, during the legislative hearings on the Freedom of Information Act, representatives from the Department of Defense, the General Services Administration, the Post Office, and the Treasury Department, had appeared before Congressional committees and testified at length as to the need for the kind of commercial privilege which the Court found in *Merrill*.

Then, at 443 U.S. 359, this Court quoted the following passage from a House Committee Report which had been adopted *after* the conclusion of the hearings at which the aforesaid agency representatives had given testimony:

“Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated *before it completes the process of awarding a contract* or issuing an order, decision, or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy.” (Emphasis as in Court’s opinion.)

Then, at 443 U.S. 359 the Court uttered the sentence which Petitioner has quoted only in part on page 13 of its Petition, as mentioned above. The full sentence, as it appears in the Court’s opinion, reads:

“In light of the complaints registered by the agencies about premature disclosure of information relating to

government contracts, we think it is reasonable to infer that the House Report, in referring to 'information . . . generated [in] the process of awarding a contract' specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts."

In light of the total context, it is apparent the Court's words "we think it is reasonable to infer . . .", must, as a matter of common sense, be taken to mean that *it would clearly be unreasonable to infer anything else*; in short, that the Court clearly found explicit, specific, Congressional intent for the *Merrill* privilege. The Court was not therefore, as Petitioner suggests, engaging in some sort of creative exercise based on mere "inference" and "analogy".

Petitioner's references to the word "analogy", on page 13 and elsewhere in its Petition, represent another instance of divorcing particular words and phrases from their context. In this connection, the precise setting in which this Court, in *Merrill*, used the word "analogy", appears at 443 U.S. 361-362; and it reads:

"Although the *analogy* is not exact, we think that the domestic policy directives and associated tolerance ranges are substantially similar to confidential commercial information generated in the process of awarding a contract. During the month that the directives provide guidance to the Account Manager, they are surely confidential, and the information is confidential in nature because it relates to the buying and selling of securities in the open market. Moreover, the directives and associated tolerance ranges are generated in the course of providing ongoing direction to the Account Manager in the execution of large scale transactions in government securities; they are, in this sense, the Government's buy-sell order to its broker." (Emphasis added.)

Again, when the Court's language is read in proper context, it is apparent the Court was not merely engaging in creative endeavors based on "inference" and "analogy", but had found an analogy so compelling it left no doubt as to the intent of Congress to include the *Merrill* privilege in Exemption 5. This view of the matter is unassailable when consideration is given to the language of the Court appearing at 433 U.S. 352, in which, in a portion of the *Merrill* opinion to be discussed more fully immediately hereafter, the Court said:

" . . . [The] domestic policy directives can fairly be described as containing confidential commercial information generated in the process of awarding a contract. . . ."

This is surely more than mere analogy.

Finally, Petitioner mischaracterizes, or at least misunderstands this Court's opinion in *Merrill* and the opinion of the Court of Appeals in the instant case where it argues the Court of Appeals went *contra* to the teaching of *Merrill* when it held that purely factual information is not shielded by Exemption 5. In this connection, Petitioner asserts the *Merrill* privilege is specifically intended to include purely factual information. (See, *e.g.*, Petition, pp. 13 and 14.)

In so arguing, Petitioner wholly ignores the instructions this Court issued to the District Court at the conclusion of the *Merrill* opinion. At that juncture in the Court's opinion, the sentence from which we made the partial quotation in the preceding paragraph appears. The full sentence (443 U.S. at 362) reads:

"Although the domestic policy directives can fairly be described as containing confidential commercial information generated in the process of awarding a contract, it does not necessarily follow that they are protected against immediate disclosure in the civil discovery process."

This Court then ordered remand of the case to the District Court for further proceedings to determine two things: First: whether, as a matter of fact, the public interest truly justified the delayed release of the Domestic Policy Directives which the Government contended was essential in the public interest; and, second: if such public interest existed, whether the "purely descriptive" portions of the Domestic Policy Directives could be severed from the "operative" portions and released immediately.

In this context, it is obvious that, in its reference to the "purely descriptive" portions of the Domestic Policy Directives, this Court had in mind precisely the same kind of material which the Court of Appeals chose to characterize as *purely factual* material. It must be concluded therefore, that there is clearly no conflict between this Court and the Court of Appeals as to the status of *purely factual* material under Exemption 5.

Finally, the examples given by Petitioner at page 14 of the Petition, to justify its contrary contentions, are wide of the mark. The examples there offered by Petitioner in support of its argument that Exemption 5 shields purely factual material, are bids on government contracts, and appraisals of real estate the Government intends to sell.

First, as to *bids*, it is immediately apparent they are not subject to Exemption 5, because they are not "inter-agency or intra-agency memorandums or letters". Instead, they are documents independently prepared and submitted to the Government by private parties outside the Government. Moreover, it is specifically required by statutes other than the Freedom of Information Act that bids be kept sealed, and *not disclosed to anyone* inside or outside of Government, until the exact time (and at the exact place) advertised

by the Government as the time and place for bid opening, at which time (and place) the bids must be *publicly* opened. (See, 10 U.S.C. 2305(c), applicable to all defense agencies; and, 41 U.S.C. 253(b), applicable to all civilian agencies.) Thus, prior to bid-opening, bids are protected from disclosure by the foregoing statutory provisions in tandem with Exemption 3 of the Freedom of Information Act, permitting information to be withheld when withholding is required by some other statute which leaves no discretion on the issue. Again, it is noted that Exemption 5 has nothing whatever to do with the case. At the time of bid-opening, by virtue of the statutory requirement, *supra*, that bids be publicly opened, they become public information, and cannot be withheld under any of the exemptions of the Freedom of Information Act, even though bids may be, and often are, the subject of intra-agency or inter-agency deliberations for a substantial period of time between bid-opening and the ultimate award of a contract.<sup>2</sup>

As for *appraisals*, it is obvious, first, that appraisals are never "purely factual" documents. They are essentially opinions, based upon the knowledge, professional skills, expertise, and experience of the particular appraiser. It is

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<sup>2</sup>Where the statutory requirement of public bid openings would compromise military secrets or other classified information, or would deter prospective contractors from submitting bids because of unwillingness to make public disclosure of trade secrets or other confidential commercial information, the Government is authorized by statute to dispense with the requirement of sealed bids and public bid openings, and to place contracts through negotiation with individual offerors. As to defense contracts, see, 10 U.S.C. 2304(a)(10), and (12). As to contracts with civilian agencies, see, 41 U.S.C. 252(c)(10) and (12). In such cases, the offers can be withheld from disclosure under Exemptions 1 and 4 of the Freedom of Information Act, in tandem with the foregoing statutory provisions, and also possibly in tandem with Exemption 3 of the Freedom of Information Act. Again, Exemption 5 has nothing to do with the case. The offers, as in the case of bids, are not "inter-agency or intra-agency memorandums or letters", and, as noted, they are covered by exemptions other than Exemption 5.



conceivable that a particular appraisal might contain purely factual or purely descriptive portions which could be segregated from its opinion portions. If that were the case, no reason appears why the purely factual or purely descriptive portions would be shielded from disclosure by Exemption 5. The clear teaching of *Merrill* is that they would not be shielded by Exemption 5.

There is nothing to the contrary in the case of *Government Land Bank v. GSA*, 671 F.2d 663 (1st Cir. 1982), (cited on p. 14 of the Petition) as pertaining to appraisals. That case involved an attempt by a prospective purchaser of land from the General Services Administration to obtain GSA's appraisal of the land so that it could drive a hard bargain with GSA. The prospective buyer was clearly not interested in obtaining only purely factual or descriptive material. It wanted the whole appraisal to strengthen its position in negotiations. The case did not hold that purely factual or descriptive material is protected by Exemption 5, nor did it say that this Court had so held in *Merrill*. In fact, that Court's understanding of *Merrill* was substantially the same as the understanding of the Court of Appeals in the instant case. The following language from the *Government Land Bank* opinion is dispositive:

"The test is not whether FOIA is being used to circumvent the discovery process. The test is whether the document (1) *falls within an area of clear Congressional concern* and (2) is not the sort of material that private litigants can get as a matter of course. Since *Merrill identified a Congressional concern that clearly encompasses* this appraisal, and since it is not the sort of document routinely disclosed to litigants, the test would seem to be met." (Emphasis added.) (671 F.2d at p. 666).



## II.

### **There Is No Support in the Legislative History for Refusing Disclosure Under Exemption 5.**

Given the teaching of *Merrill* that Exemption 5 will not be construed to include a privilege unless there is evidence that Congress, to use this Court's phraseology *specifically contemplated* that privilege, or, to use the phraseology of the Court of Appeals, *explicitly recognized* such a privilege, or, as said by the First Circuit in the case of *Government Land Bank v. GSA, supra*, that the privilege "falls within an area of clear Congressional concern", it plainly appears the Court of Appeals reached the correct result in this case.

Nowhere in the legislative history of the Freedom of Information Act is there any evidence that Congress "specifically contemplated" or "explicitly recognized" any privilege under Exemption 5 for factual statements given to Air Force Safety Investigation Boards under a promise of confidentiality; nor is there any evidence in the legislative history that the protection of such statements from disclosure "falls within an area of clear Congressional concern."

The only exemptions in the Act which specifically refer to confidentiality are the provisions of Exemption 7(d) which authorize the withholding of records compiled for law enforcement purposes, to the extent their disclosure would disclose the identity of a confidential source, or, "in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source . . ."; and, Exemption 4, authorizing nondisclosure of confidential trade secrets and commercial or financial information obtained from a person outside of Government.

The only exemptions which do not mention confidentiality expressly, but which would seem to authorize withholding of statements given under a promise of confidentiality in proper circumstances, are Exemption 1, allowing the withholding of statements specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and, in fact, properly classified pursuant to such Executive Order; and, Exemption 3, permitting nondisclosure of statements specifically exempted from disclosure by statute, *other than the Freedom of Information Act*, when such statute leaves no discretion on the issue of disclosure or establishes particular criteria for withholding information, or refers to particular types of information to be withheld.

Given the fact that Congress has expressly provided for promises of confidentiality in the specific areas covered by Exemptions 1, 3 and 7(d), and given the fact that neither the express wording nor the legislative history of Exemption 5 shows any evidence of *specific Congressional contemplation*, or *explicit Congressional recognition*, or *clear Congressional concern* with purely factual statements made to Air Force Safety Investigation Boards under promises of confidentiality, it must be concluded that Exemption 5 contains no such privilege.

Any other conclusion would clearly violate the intent of Subsection (c) of the Act, 5 U.S.C. 552(c), which reads, in pertinent part, as follows:

"This section [meaning the Act, as a whole] does not authorize withholding of information or limit the availability of records to the public except as specifically stated in this section."

The Congressional response to this Court's decision in the case of *Federal Aviation Administration v. Robertson*, 422 U.S. 255 (1975), would seem to shed further light on

the pertinent legislative intent. In *Robertson*, this Court found a privilege for statements given by airline company personnel to the Federal Aviation Administrator. There, Civilian Aviation Safety was the subject matter addressed. The rationale by which the Administrator and this Court justified the privilege was substantially the same as the rationale advanced by Petitioner in the instant case in support of a comparable privilege for military aviation safety. See 422 U.S. at pages 266, 267. The particular Freedom of Information Act exemption relied upon in that case, however, was Exemption 3, as it was then written; not Exemption 5. At that time, the wording of Exemption 3 simply authorized withholding of information pursuant to a statute, and did not contain the requirements of Exemption 3 as it is presently written, requiring the statute leave no discretion on the issue, or the statute establish particular criteria for withholding information, or refer to particular types of information to be withheld.

The legislative response to that decision was to rewrite Exemption 3 in the form in which it now exists. The legislative history explaining the amendment states expressly that the legislative intent was to overrule *Federal Aviation Administration v. Robertson*, *supra*. 1976 U.S. Code Cong. and Adm. News, pp. 2260-2261.

In this context, it is submitted that, in rewriting Exemption 3 in its present form for the purpose of overruling the *Robertson* case, Congress very clearly said exactly what this Court said in *Merrill*, and the Court of Appeals said in the instant case, and the First Circuit said in the *Government Land Bank* case, *supra*; namely, that Congress did not intend to include any privileges in the Freedom of Information Act, unless there was clear evidence that Congress specifically contemplated, or explicitly recognized or was clearly concerned with the privilege in question.

It plainly appears therefore, that the Court of Appeals correctly applied the teaching of *Merrill* to the facts of the instant case.

### III.

#### **Petitioner Has Failed to Conclusively Establish a Factual Basis for the Privilege Asserted.**

Given the importance of aviation safety in our Air Force, both in human terms and in terms of national defense, Petitioner's vigorous advocacy is understandable, but, there is another side to the issue and because of that, the need for confidentiality can not be accepted as conclusively established.

Petitioner quotes from the Affidavit of the Commander of the Air Force Inspection and Safety Center. The relied upon excerpt recognizes an alternative to confidentiality, namely, *subpoena power*. General Russell concluded:

"Lacking authority to subpoena witnesses, accident investigators must rely on such assurances [of confidentiality] in order to obtain full and frank discussion concerning all the circumstances surrounding an accident." (Affidavit of Maj. Gen. Len C. Russell; See, Petition, p. 5.)

In support of subpoena power, which Congress could readily provide, it must be noted that, although confidentiality may (arguably) promote full and frank discussion, it can also have the effect of concealing information which could and should be made available to the public, to Congress, to the Comptroller General, and indeed, to the Secretary of Defense, himself, all of whom would be excluded or could be excluded from access to any such information if the privilege asserted by Petitioner really exists. (See, A.F. Reg. 127-4, as set forth, in part, in Appendix E to the Petition.) The potential evils which could flow from such

concealment of information are obvious and we do not dwell upon them here.

At an earlier phase of the litigation brought by HOOVER (Petition, p. 4), this same question of privilege came before Chief Judge Adrian A. Spears of the United States District Court for the Western District of Texas in connection with a deposition then being taken at Kelly Air Force Base, Texas. Judge Spears made no ruling on the point, stating he believed the matter should be dealt with by the trial Judge in the HOOVER litigation, in California. In his deliberations which were brought to the attention of the Court of Appeals, however, Judge Spears made the following remarks, which we submit are a most eloquent statement of reasons supporting the *contra* side of the issue of confidentiality:

"The first reaction I had when I read this was that certainly if there ever was a privilege it was waived, but now I find that the king can not only do no wrong but the king can do a wrong and still not be wrong. So, I just don't know. I know we have to do a lot of things in government to protect people who lack the courage to tell the truth. It is really a sad commentary, though, that you have to provide them with all the confidentiality and everything else, just to tell the truth about what happened in a situation, and I am not sure that this doesn't encourage people to fabricate and to lie in one hearing and then come in, clothed with either immunity or confidentiality, and finally be prevailed upon to tell the truth. Maybe that is necessary, and I guess in dealing with people unusual methods are necessary in order to get to the facts, and I am not going to even debate the proposition that it is necessary for the Air Force or for any other agency of the government to learn the truth, but it is a deplorable commentary upon our system when we have to have a governmental agency either participate in sham and

false information on the one hand and then go into a closed session and get the truth on the other and then deprive people whose interests are affected thereby of access to both. A person can go into this collateral investigation, apparently, and lie through his teeth and then a litigant for whose benefit that testimony is given can use it, but the same witness may go into the investigative situation and, clothed with confidentiality and privilege and immunity, tell the truth, which is absolutely contrary, and that witness not only receives immunity but perhaps is not subjected to any disciplinary action or anything else; so, they are permitted to protect the interests they might personally have, even though they lie in one instance and tell the truth in another."

In the circumstances, we believe the Court of Appeals was eminently correct in refusing to recognize the privilege claimed by Petitioner for purely factual statements, and that the Court of Appeals was also correct when it suggested (Petition, Appendix A, p. 17A) the proper course for the Air Force to follow would be to present its case to Congress. The Congress could then properly balance the Air Force claim of future need against the public interest and the compelling need for maximum disclosure of information that does not involve the national defense and security of the United States.

### **Summary of Argument.**

As noted by the Court of Appeals it appears the correct remedy here, if a remedy is needed, is for the Air Force to seek legislation both protecting Air Force Accident Investigations and providing necessary subpoena power, thereby properly leaving to the Congress the responsibility for determining and providing the Air Force such relief as it may genuinely need. The exercise in judicial legislation urged



by Petitioner here should neither be countenanced nor indulged.

The legislative history and the legislation favoring disclosure of information, the contemporary cases, and this Court's opinion in *Merrill*, Respondent submits, are persuasive. The legislative mandate of the Act, we believe, was written expressly to cure the enigmatic and, as here, the sometimes seriously prejudicial effects of the policy of nondisclosure urged by Petitioner. While national security considerations or potential conflicts violating the time honored doctrine of Separation of Powers may indeed be reason for recognizing executive privilege, neither can be demonstrated here. And, neither is it enough for Petitioner to invoke Exemption 5 claiming promises of confidentiality allegedly springing from Air Force Regulations in effect on October 9, 1973, when in fact, there is no regulatory basis for the promise and no reasonable basis for the confidentiality. Accordingly, we submit, certiorari should be denied.

Should the Court in its discretion be inclined to grant certiorari, it is respectfully suggested the judgment of the Ninth Circuit Court of Appeals be affirmed thus inviting legislation, if there is a compelling need, once the Fifth, Eighth and Ninth Circuits have been thus reconciled.

Respondent Mills respectfully submits this Court provided its analysis of the legislative intent of the Act in its decision in *Merrill* and the Court of Appeals correctly interpreted and applied *Merrill* to the facts of the instant case.

### **Conclusion.**

The decision of the Court of Appeals should be affirmed, should this Court choose to grant certiorari. In the event this Court is inclined to withhold its Writ of Certiorari, in its discretion, Respondent Mills respectfully suggests it would be wholly appropriate to do so thereby permitting the de-



cision of the Court of Appeals to stand and leaving it to the Congress to provide such remedial legislation as the Air Force may demonstrate it needs.

Dated: May 31, 1983.

Respectfully submitted,

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No. 82-1616

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CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1982

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UNITED STATES OF AMERICA, PETITIONER

v.

WEBER AIRCRAFT CORPORATION, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT*

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**REPLY MEMORANDUM FOR THE PETITIONER**

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# In the Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-1616

UNITED STATES OF AMERICA, PETITIONER

v.

WEBER AIRCRAFT CORPORATION, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

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## REPLY MEMORANDUM FOR THE PETITIONER

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1. Respondents do not deny that the decision below conflicts with decisions of two other courts of appeals holding that Exemption 5 of the Freedom of Information Act protects confidential witness statements made in the course of military air crash safety investigations. See *Cooper v. Department of the Navy*, 558 F.2d 274 (5th Cir. 1977), modified on other grounds, 594 F.2d 484 (5th Cir.), cert. denied, 444 U.S. 926 (1979); *Brockway v. Department of the Air Force*, 518 F.2d 1114 (8th Cir. 1975). Instead, respondents contend (Weber Br. in Opp. 10-20; Mills Br. in Opp. 5-17) that those decisions are no longer valid in light of *FOMC v. Merrill*, 443 U.S. 340 (1979).<sup>1</sup>

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<sup>1</sup>We note that this Court denied certiorari in *Cooper* following its decision in *Merrill*.

a. Respondent Weber Aircraft Corp. (Weber) maintains (Br. in Opp. 11, 13-14) that *Merrill* implicitly overruled *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963), which recognized that statements such as those at issue here are privileged in civil discovery. In *Merrill*, the Court held (443 U.S. at 353-354) that under Exemption 5 of the FOIA, which protects documents normally or routinely privileged in the civil discovery context,<sup>2</sup> disclosure of privileged documents may not be denied simply because an agency "conclude[s] that disclosure would not promote the 'efficiency' of its operations or otherwise would not be in the 'public interest.'" Weber interprets this to mean that efficiency of government operations and the public interest no longer provide a valid rationale for any civil discovery privilege (Br. in Opp. 14). And since the *Machin* privilege is grounded upon such considerations (see Br. in Opp. 13), Weber concludes (Br. in Opp. 14) that "the *Machin* privilege is dead."

Weber's argument provides no grounds for denying certiorari. If there were any serious question about the continued validity of the important and widely accepted civil discovery privilege recognized in *Machin*, that would itself warrant review by this Court. However, the suggestion that *Machin* was silently overruled by *Merrill* is absurd. By holding in *Merrill* that Exemption 5 does not authorize nondisclosure under a "vague 'public interest' standard" (443 U.S. at 354), this Court merely reaffirmed that Exemption 5 applies only to documents normally privileged in civil discovery. The Court certainly did not question the continued validity of those civil discovery privileges that promote the public interest and government efficiency. Any

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<sup>2</sup>See *FTC v. Grolier Inc.*, No. 82-372 (June 6, 1983), slip op. 7; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148-149 (1975).

such holding would undermine many civil discovery privileges, including the predecisional and attorney work product privileges, which this Court has held are incorporated into Exemption 5. *FOMC v. Merrill*, *supra*, 443 U.S. at 355; *NLRB v. Sears, Roebuck & Co.*, *supra*, 421 U.S. at 150-154.

b. Respondents maintain (Weber Br. in Opp. 11-13; Mills Br. in Opp. 5-17) that even if the documents at issue in this case would normally be privileged in civil discovery, they are not protected by Exemption 5 because, as construed in *Merrill*, Exemption 5 incorporates only those privileges explicitly recognized in the legislative history. This argument also provides no grounds for denying review. First, in *Merrill* the Court expressly "d[id] not consider" whether Exemption 5 incorporates the *Machin* privilege (443 U.S. at 355-356 n.17), and respondents have provided no reason for believing that the courts of appeals that decided *Cooper* and *Brockway* would nevertheless decline to follow those decisions today.

Second, as explained in our petition (at 15-19), *Merrill* did not establish a rigid rule for determining whether a particular privilege is incorporated into Exemption 5.<sup>3</sup> The construction of *Merrill* adopted by the court below and defended by respondents—that Exemption 5 incorporates only those civil discovery privileges explicitly mentioned in the legislative history—would have far-reaching results. Any party in civil litigation with the government may seek to obtain documents both through discovery and by filing an FOIA request. The rule that Exemption 5 shields those

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<sup>3</sup>Contrary to respondent Mills' assertion (Br. in Opp. 5-6 n.1), *Merrill* did not characterize the *Machin* privilege as a "less plausible" privilege under Exemption 5. The Court merely considered the privilege for certain confidential commercial information to be the "most plausible" of the privileges asserted for the particular information at issue in that case (443 U.S. at 355-356).



documents not normally or routinely disclosed in civil discovery is meant to prevent civil litigants who are or would be denied discovery on grounds of privilege from obtaining the same documents under the FOIA. But if Exemption 5 of the FOIA incorporates only those privileges explicitly recognized in the legislative history, all other civil discovery privileges could be circumvented by filing an FOIA request and would therefore be effectively abolished in government litigation. There is nothing in *Merrill* to suggest that this Court intended such a startling result. And if such a result were intended, that would obviously be a matter of considerable importance that would merit clarification.<sup>4</sup>

Finally, as we explained in our petition (at 15-19), both the plain language of Exemption 5 and the legislative history show that Congress intended Exemption 5 to incorporate the *Machin* privilege. The support in the legislative history for this construction is as strong as the support for incorporation of the privilege for confidential commercial information recognized in *Merrill*.

2. Respondents' remaining arguments are insubstantial. Weber contends (Br. in Opp. 6-7) that the government failed to show that the statements at issue were made pursuant to promises of confidentiality. However, both courts below concluded otherwise. See Pet. App. 4a ("issue is whether Exemption 5 permits [nondisclosure of] statements of military personnel given under a promise of confidentiality \* \* \*"); *id.* at 23a-24a. An uncontroverted affidavit filed

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<sup>4</sup>Just recently, this Court reiterated (*FTC v. Grolier Inc.*, No. 82-372 (June 6, 1983), slip op. 7-8 (emphasis omitted), quoting *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975) that "'Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context.'" See also *Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14 (1982). ("The primary purpose of the FOIA was not to benefit private litigants or serve as a substitute for civil discovery").

in district court established that the statements were obtained under a pledge of confidentiality in the course of an authorized Air Force safety investigation. R. E. 42, Affidavit of Maj. Gen. Len C. Russell, Commander Air Force Inspection and Safety Center at 2. Contrary to Weber's assertion (Br. in Opp. 6-7), the applicable Air Force regulation (A.F. Reg. 127-4 (Jan. 1, 1973) (Pet. App. 31a-32a)) clearly established that such statements were privileged and confidential and were to be used "solely within the [Air Force] \* \* \* to prevent accidents." And since at least 1963, the courts have recognized that it is the policy of the military services to make such promises of confidentiality. See *Machin v. Zuckert*, *supra*, 316 F.2d at 339.

3. Weber maintains (Br. in Opp. 7-8), without citing supporting authority, that any protection offered by Exemption 5 was waived because an Air Force employee inadvertently allowed Hoover's counsel to see portions of the documents during a deposition. But this claim was not raised in or decided by the court of appeals, and in any event "[a]n *unauthorized* disclosure of documents does not \* \* \* constitute a waiver of the applicable FOIA exception." *Medina-Hincapie v. Department of State*, 700 F.2d 737, 742 n.20 (D.C. Cir. 1983); see also *Murphy v. FBI*, 490 F.Supp. 1138, 1142 (D.D.C. 1980); *Safeway Stores, Inc. v. FTC*, 428 F.Supp. 346, 347 (D.D.C. 1977).

4. There is also no merit in Weber's claim (Br. in Opp. 8-9) that certiorari should be denied because any promise of confidentiality made to Hoover was waived when he brought suit. This issue was not decided below, and the court of appeals required disclosure of Airman Dixon's statement as well as Hoover's (see Pet. App. 4a & n.4, 12a). Furthermore, the *Machin* privilege is intended not to benefit individual witnesses but to further a public and governmental interest in promoting military air safety.

Governmental promises of confidentiality would provide insufficient incentive for the necessary candor if witnesses feared that they could not later pursue their private rights in litigation without having their prior statements disclosed. This is clearly recognized in the regulation under which the statements at issue here were obtained. A.F. Reg. 127-4, *supra* (Pet. App. 31a-32a).

5. Respondents argue (Weber Br. in Opp. 9-10; Mills Br. in Opp. 17-19) that the government failed to establish that releasing statements such as those at issue here would impair military aircraft safety. However, the government had no obligation in this case to prove that there is a sound empirical basis for the *Machin* privilege; the only issue is whether that privilege was incorporated into Exemption 5. In any event, common sense and the affidavits submitted below (see Pet. 5) support the proposition that witnesses are more likely to be candid when their statements are made under promises of confidentiality. And neither respondents nor the court of appeals have suggested how the government could obtain statistical proof that fewer accidents occur when such promises are given.<sup>5</sup>

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<sup>5</sup>Weber suggests (Br. in Opp. 9-10, 19-20) that the *Machin* privilege is unnecessary because witness statements taken by the National Transportation Safety Board ("NTSB"), which investigates civilian aircraft accidents, are not privileged. This argument, however, has little if any bearing upon the question whether the *Machin* privilege is incorporated into Exemption 5. Moreover, fundamental differences between the NTSB's procedures and those of military investigators make facile comparisons concerning the treatment of witness statements of minimal value. For example, witnesses may be compelled to testify in NTSB investigations (see 49 C.F.R. 845.21(c)), whereas military investigators conducting safety investigations lack authority to subpoena witnesses (see Pet. 5) and must therefore rely upon promises of confidentiality to obtain cooperation. The NTSB's reports may not be used in litigation concerning the accident (49 U.S.C. 1441(e)), and the NTSB is not required to release any document protected under FOIA exemptions (49 U.S.C. 1905). Thus, while statements furnished directly to the

6. Finally, Weber contends (Br. in Opp. 17-19) that incorporation of the *Machin* privilege into Exemption 5 would condone perjury and create the potential for unjust results in civil litigation by concealing potentially important evidence.<sup>6</sup> This, however, is a policy argument against the *Machin* privilege and has little bearing upon the question whether Congress intended to incorporate that privilege into Exemption 5. Moreover, the same objection may be made with respect to all evidentiary privileges. Such privileges exist because in certain circumstances other considerations are thought to outweigh the interest in disclosure of relevant information. In cases like this one, disclosure of the witness statements would result in public access to more information in the short run but, by inhibiting frank disclosure by witnesses, would almost certainly decrease the amount of useful information available for any purpose when future accidents take place. See *Cooper v. Department of the Navy*, *supra*, 558 F.2d at 277.

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NTSB may be released, if our interpretation of Exemption 5 is correct, the NTSB would not be required to release the statements involved in this case if supplied to it by the military. 49 U.S.C. 1442(c), upon which Weber relies (Br. in Opp. 19-20), merely requires the military to furnish certain information to the Secretary of Transportation and the NTSB. It says nothing about public disclosure.

<sup>6</sup>This argument, like many of Weber's contentions, is based on Weber's litigation need for the statements at issue. But Weber's rights to the documents "are neither increased nor decreased by reason of the fact that it claims an interest in [them] greater than that shared by the average member of the public." *NLRB v. Sears, Roebuck & Co.*, *supra*, 421 U.S. at 143 n.10.

For the reasons stated above and in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE  
*Solicitor General*

JUNE 1983

SEP 24 1983

ALEXANDER L. STEVAS,  
CLERK

No. 82-1616

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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UNITED STATES OF AMERICA, PETITIONER

v.

WEBER AIRCRAFT CORPORATION, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF FOR THE PETITIONER**

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### **QUESTION PRESENTED**

Whether confidential statements made by witnesses in an Air Force air crash safety investigation are protected from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).



## II

### **PARTIES TO THE PROCEEDING**

The respondents are Weber Aircraft Corporation  
and Mills Manufacturing Corporation.

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 82-1616

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v.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## **BRIEF FOR THE PETITIONER**

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### **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 688 F.2d 638. The district court's findings of fact and conclusions of law (Pet. App. 21a-26a) are not reported.

### **JURISDICTION**

The judgment of the court of appeals (Pet. App. 18a) was entered on September 21, 1982, and a petition for rehearing was denied on December 3, 1982 (Pet. App. 29a). On February 23, 1983, Justice Rehnquist extended the time within which to file a

petition for a writ of certiorari to and including April 1, 1983. The petition was filed on March 31, 1983, and was granted on June 27, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

#### STATUTE AND REGULATIONS INVOLVED

1. 5 U.S.C. 552(a)(4)(B) provides:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

2. 5 U.S.C. 552(b)(5) provides:

(b) This section does not apply to matters that are—

\* \* \* \*

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

3. Pertinent provisions of Air Force Regulation 127-4 (Jan. 1, 1973) are set out at Pet. App. 31a-33a. Pertinent provisions of Air Force Regulation 127-4 (Jan. 18, 1980) and Air Force Regulation 110-14 (July 18, 1977) are set out in an appendix to this brief.



## STATEMENT

1. The Air Force, like the other military services,<sup>1</sup> has developed an extensive program to promote aircraft safety. The centerpiece of this program is the intensive safety investigation undertaken following any serious aircraft mishap. The sole purpose of this investigation is to determine the cause of the accident and to develop corrective measures to prevent similar mishaps in the future. See A.F. Reg. 127-4 ¶ 2-4.a (Jan. 18, 1980).<sup>2</sup> In addition to examining physical evidence, the Air Force safety investigation board ("safety board") encourages witnesses to come forward with information of any kind that might bear on the cause of the crash. And to encourage the maximum degree of cooperation,<sup>3</sup> witnesses are advised that their statements, which are unsworn, will not be divulged to anyone for any purpose other than safety and accident prevention. A.F. Reg. 127-4 ¶¶ 2-5, 3-8.d (Jan. 18, 1980), Attachment 3.<sup>4</sup> In this way,

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<sup>1</sup> See *Cooper v. Department of the Navy*, 558 F.2d 274, 275-276, modified on other grounds, 594 F.2d 484 (5th Cir. 1977), cert. denied, 444 U.S. 926 (1979).

<sup>2</sup> The safety investigation in this case was conducted pursuant to A.F. Reg. 127-4 (Jan. 1, 1973), pertinent provisions of which are set forth at Pet. App. 31a-33a. The 1980 amendment to this regulation (A.F. Reg. 127-4 (Jan. 18, 1980) (see pages 1a-8a, *infra*)) did not change the privilege or procedures involved here in any material respect.

<sup>3</sup> Such voluntary cooperation is particularly important since the safety board lacks subpoena power. A.F. Reg. 127-4 (Jan. 18, 1980); see also A.F. Reg. 127-4 (Jan. 1, 1973). Air Force members and employees may be ordered to testify, but other witnesses, such as manufacturers' representatives, testify voluntarily.

<sup>4</sup> See also A.F. Reg. 127-4 ¶¶ 12.b, 12.c, and 19.a(3) (Jan. 1, 1973).

the safety board gains access to information that might otherwise be withheld, such as information against a witness's own interests or those of an employer or co-worker and information that may be impressionistic or speculative (J.A. 55). See generally Burton, *Aircraft Accident Investigation*, 14 JAG L. Rev. 233 (1973); Moorman, *Executive Privilege and the Freedom of Information Act*, 21 A.F. L. Rev. 587 (1979).

While most of the factual portions of the safety board's report are released, the Air Force has established strict procedures to maintain the confidentiality (both within and outside the government) of witness statements furnished in confidence.<sup>5</sup> The Air Force credits its safety investigation program, which has been in existence for more than 25 years, with significant results in improving aircraft safety (J.A. 39-40, 43-44).<sup>6</sup>

In addition to the safety investigation, the Air Force routinely conducts a second investigation, termed a "collateral investigation," following any serious aircraft mishap. The collateral investigation is designed to gather and preserve evidence for all purposes other than safety, i.e., for use in official, on-

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<sup>5</sup> A.F. Reg. 127-4 ¶¶ 3-8.d(3), (4), 5-1, 5-2 (Jan. 1, 1980). See also A.F. Reg. 127-4 ¶ 19 (Jan. 1, 1973); A.F. Reg. 110-14 (Nov. 1, 1973); Burton, *Aircraft Accident Investigations*, 14 JAG L. Rev. 233 (1973).

<sup>6</sup> Air Force statistics show that in 1950 it lost 665 aircraft in aircraft mishaps, with 781 fatalities. By 1979, these figures were reduced to only 83 aircraft destroyed, with 77 fatalities. The Air Force attributes this remarkable improvement directly to its "aggressive flight safety program," of which the safety investigation reports are "a most significant and important part." J.A. 39-40.

the-record proceedings, such as courts-martial, disciplinary and administrative proceedings and civil litigation. See A.F. Reg. 110-14 (July 18, 1977).<sup>7</sup> Witnesses are advised of their rights and testify under oath (*ibid.*). Factual information examined and generated by the safety board (including the names of witnesses) is shared with the collateral investigation board,<sup>8</sup> but the investigations themselves are strictly independent. Most important, witness statements given to the safety board under a promise of confidentiality are not divulged to the collateral board.<sup>9</sup>

To protect the integrity of this vital military air safety program, the courts have recognized a civil discovery privilege for confidential witness statements made in connection with military safety investigations. See *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963).<sup>10</sup> See also *Mc-*

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<sup>7</sup> The collateral investigation in this case was conducted pursuant to A.F. Reg. 110-14 (Nov. 1, 1973). See Pet. App. 2a n.2.

<sup>8</sup> A.F. Reg. 127-4, ¶ 2-5.d(2), 5-2 (Jan. 18, 1980).

<sup>9</sup> A.F. Reg. 127-4, ¶ 2-5.d(2), 5-2 (Jan. 18, 1980); A.F. Reg. 110-14, ¶ 2.e and f (July 18, 1977).

<sup>10</sup> In *Machin*, an Air Force crewman injured in a plane crash brought suit against the manufacturer of the plane's propeller assemblies and attempted to subpoena the Aircraft Accident Investigative Report prepared by the Air Force. The court of appeals held (316 F.2d at 339) that the statements taken from witnesses who participated in the investigation were privileged. The court added (*ibid.*) that the same privilege "extends to any conclusions that might be based in any fashion on such privileged information." The court also noted (*ibid.*) that the deliberative process privilege "attaches to any portions of the report reflecting Air Force deliberations or recommendations as to policies that should be pursued."

*Cormick on Evidence* § 108, at 230 n.6 (E. Cleary 2d ed. 1972); 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2019, at 169 n.22 (1970). Similarly, two courts of appeals have held that such statements are exempt from disclosure under Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. 552(b)(5), which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." See *Cooper v. Department of the Navy*, 558 F.2d 274, modified on other grounds, 549 F.2d 484 (5th Cir. 1977), cert. denied, 444 U.S. 926 (1979); *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975).

2. In the accident giving rise to the documents at issue in this litigation, an Air Force pilot, Captain Richard Hoover, suffered serious injuries when he ejected from his plane after an engine failure. Pursuant to its regulations, the Air Force conducted both a "collateral investigation" and a "safety investigation." When Captain Hoover brought suit in federal court for damages against the manufacturers of his plane's ejection equipment,<sup>11</sup> two of the defendant companies, respondents Weber Aircraft Corporation and Mills Manufacturing Corporation, sought discovery of the Air Force investigation reports pertaining to the accident. The Air Force released the completed record of the collateral investigation and portions of the safety investigation report. However, relying upon the privilege recognized in *Machin*, the Air Force declined to release confidential statements made in connection with the safety investigation by Captain Hoover and an airman who helped to rig the ejection equipment. (Pet. App. 2a-3a.)

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<sup>11</sup> *Hoover v. Weber Aircraft Corp.*, C.D. Cal. No. CV 74-1064-WPG.

Respondents then filed Freedom of Information Act requests seeking disclosure of the confidential statements, but the Air Force refused to release the records in reliance on Exemption 5. After exhausting administrative remedies, respondents brought this action in the United States District Court for the Central District of California. Pet. App. 3a-4a. In an uncontroverted affidavit filed in district court, Major General Russell, the Commander of the Air Force Inspection and Safety Center, pointed out (J.A. 38-39) that the effectiveness of the Air Force safety investigation program

depends to a large extent upon [its] ability to obtain full and candid information on the cause of each aircraft accident. \* \* \* Open and candid testimony is received because witnesses are promised that for the particular investigation their testimony will be used solely for the purposes of flight safety and will not be disclosed outside of the Air Force. Lacking authority to subpoena witnesses, accident investigators must rely on such assurances in order to obtain full and frank discussion concerning all the circumstances surrounding an accident.

Major General Russell also averred (J.A. 39) that the inability of safety investigators to make enforceable promises of confidentiality "would seriously hinder the accomplishment of prompt corrective action designed to preclude the occurrence of a similiar accident" and that the privilege against forced disclosure of witness statements is therefore "the very foundation of a successful Air Force flight safety program" (*ibid.*). The Secretary of the Air Force submitted an affidavit as well, concluding (J.A. 55) that public release of witness statements "would effectively dry

up a vital source of information because the promise of confidentiality would no longer be enforceable."

The district court held that the witness statements had been properly withheld under Exemption 5 (Pet. App. 21a-26a, 27a), but a divided panel of the court of appeals reversed, holding that Exemption 5 does not incorporate the *Machin* civil discovery privilege (Pet. App. 1a-9a). The court of appeals relied heavily upon *FOMC v. Merrill*, 443 U.S. 340 (1979), in which this Court held that Exemption 5 incorporates a limited privilege for confidential commercial information. The court of appeals acknowledged (Pet. App. 8a n.6), however, that "*Merrill* expressly left open the question whether Exemption 5 incorporates [the *Machin*] privilege."

The court of appeals noted (Pet. App. 6a) the statement in *Merrill* (443 U.S. at 355) that a claim that Exemption 5 incorporates a privilege other than those specifically recognized in the legislative history<sup>12</sup> "must be viewed with caution." Observing that the *Merrill* Court had found evidence in the legislative history that Congress "specifically contemplated a limited privilege for confidential commercial information" (*id.* at 359), the court of appeals stated (Pet. App. 6a; emphasis added): "As we read *Merrill*, this finding is the linchpin of the Court's analysis: *Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history.*"

Although the court of appeals assumed "that the witness statements here would be shielded from civil discovery under the *Machin* privilege" (Pet. App.

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<sup>12</sup> The Court stated in *Merrill* (443 U.S. at 355 & n.15) that the deliberative process and the attorney-client and work-product privileges were "expressly mentioned" in the legislative history.



8a), it found no evidence in the legislative history of the FOIA "that Congress intended Exemption 5 to protect witness statements given under a promise of confidentiality" during a military air crash investigation (*id.* at 10a). The court instead concluded (*id.* at 11a-12a) that Congress intended to protect only legal or policy matters and the exchange of ideas among agency personnel, rather than purely factual material.<sup>13</sup> Accordingly, the court of appeals remanded the case to the district court to determine which portions of the witness statements are factual and which constitute predecisional advice, opinions, or recommendations that may be withheld under the deliberative process privilege incorporated into Exemption 5 (see *id.* at 12a, 18a).<sup>14</sup>

Judge Smith dissented, stressing that "[w]e deal here with the lives of the persons who fly military aircraft" (Pet. App. 18a). Judge Smith stated (*id.* at 19a): "I do not think it can be said that *Merrill* constitutes a repudiation, *sub silentio*, of *Cooper* and *Brockway*. I believe these cases to be sound, and I would follow them and affirm."<sup>15</sup>

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<sup>13</sup> The court of appeals also held (Pet. App. 14a-18a) that traditional equity principles did not justify nondisclosure of the witness statements.

<sup>14</sup> The court of appeals reversed the portion of the district court judgment holding that an Air Force medical report fell within the deliberative process privilege as incorporated into Exemption 5 (see Pet. App. 13a). The court of appeals directed the district court on remand to determine whether parts of the report constituted "factual reporting" and were consequently not covered by that privilege (*ibid.*). This portion of the court of appeals' decision is not at issue here.

<sup>15</sup> After the court of appeals' decision in this case, the Senate passed a provision (*Omnibus Defense Authorization Act*,



### SUMMARY OF ARGUMENT

This case concerns the continuing effectiveness of a vital component of the military services' air safety program. When a military aircraft is involved in a serious mishap, the services conduct a formal "collateral investigation," in which testimony is taken on the record and may be used in subsequent administrative and judicial proceedings. They also conduct an independent "safety investigation," the sole purpose of which is accident prevention. In order to obtain complete and candid information from pilots, mechanics, manufacturers' representatives, and others, the safety investigators promise that any information given will be kept confidential and will not be used for any purpose other than safety. As a result of these promises, witnesses are induced to provide information that may lead to life-saving corrective action. If confidentiality could not be assured, witnesses' concerns about their careers and possible financial liability would make them hesitant to furnish information that might tend to establish their responsibility for an accident. Crucial information would thus remain hidden.

Recognizing the important role played by confidential statements made to military aircraft safety investigators, the courts have long accorded those statements privileged status when sought in civil litigation. The court of appeals effectively abolished that

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S. 675, 98th Cong., 1st Sess. § 1009 (1983)) to protect statements such as those involved in this case from disclosure under the FOIA. See S. Rep. No. 98-174, 98th Cong., 1st Sess. 249-250 (1983). Enactment of this proposal has been deferred pending the submission by the Department of Defense of further information concerning its present practices. See S. Conf. Rep. No. 98-213, 98th Cong., 1st Sess. 264 (1983).

privilege, however, by making such statements freely available under the Freedom of Information Act. The decision below is wrong for two separate reasons.

A.

Exemption 5 of the Freedom of Information Act protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The Exemption thus authorizes nondisclosure of any material routinely privileged in the civil discovery context. Since the statements at issue in this case fall within the well-recognized privilege for confidential statements made by witnesses in a military air crash safety investigation, they are protected by Exemption 5.

Contrary to the holding of the court of appeals, Exemption 5 is not limited to materials covered by one of the privileges expressly mentioned in its legislative history. The language of Exemption 5 provides no support for the proposition that the Exemption protects certain privileged materials but not others. By its terms, Exemption 5 applies without qualification to any internal memorandums or letters that "would not be available by law to a party \* \* \* in litigation with the agency."

The legislative history confirms the broad reach of the statutory language. The Senate Report (S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965)) states that the purpose of Exemption 5 "is to protect from disclosure \* \* \* those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency". Similarly, the House Report (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)) states that under Exemption 5 "any

internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." While each report specifically mentions a few types of privileged materials protected by Exemption 5, there is nothing to suggest that these examples were intended as an exhaustive list of the incorporated privileges. Indeed, Congress had every reason for not attempting to compile such a list, *e.g.*, the all-inclusive language of Exemption 5, which made such enumeration unnecessary; the brief space devoted to the exemption in the congressional reports; and the risk of omitting a narrow but valuable privilege.

Consistent with the statutory language and legislative history, this Court repeatedly has observed that "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); accord, *FTC v. Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 7; see also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Although the court of appeals relied heavily upon dicta in *FOMC v. Merrill*, 443 U.S. 340, 354-355 (1979), the court read far too much into those statements. Contrary to the decision below, *Merrill* did not establish a rigid rule for determining whether a particular privilege is incorporated into Exemption 5.

The court of appeals' conclusion that "Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history" (Pet. App. 6a) also conflicts with common sense. If the court's construction of Exemption 5 were correct, all

other privileges would be effectively abolished whenever the information sought was held by the government. Any party denied discovery in civil litigation on the basis of such a privilege could obtain the desired information simply by filing a FOIA request. Not only would this make the government a second-class litigant, but it would effectively alter the scope of privileges in purely private suits, such as the tort action for which the statements involved in this case have been sought. There is nothing to suggest that Congress intended such results.

#### B.

Even if Exemption 5 does not incorporate every privilege recognized in civil discovery, it nevertheless shields the type of statements at issue here.

The legislative history of Exemption 5 provides strong evidence that Congress specifically intended to protect confidential statements given in military air safety investigations. As originally framed, Exemption 5 would not have applied to the type of statements involved in this case, but the provision was changed to substantially its present form by the Senate committee, which stated that its amendments responded to suggestions made by witnesses at the committee hearings. One of the suggestions repeatedly made at those hearings, without eliciting any opposition, was that disclosure of statements made in air crash investigations should not be required.

Thus, here, as in *Merrill* (443 U.S. at 359), "it is reasonable to infer" that Congress "specifically contemplated" that Exemption 5 would cover the materials at issue. Furthermore, in this case, as in *Merrill* (*id.* at 360), the privilege in question does not "substantially duplicate any other FOIA exemp-

tion." Accordingly, under the analysis employed in *Merrill*, disclosure of the privileged statements sought by respondents is not mandated by the FOIA.

Finally, nondisclosure of confidential statements made to military air crash safety investigators is fully consistent with the underlying purposes of the FOIA. Protecting such statements obviously does not contravene Congress' strong aversion to secret agency law. And disclosure would not promote open government, ensure an informed citizenry, or hold government accountable for its actions. If witnesses interviewed by safety investigators could not be promised confidentiality, they would be unlikely to reveal anything not divulged during the parallel collateral investigation. As a result, the information available to the public would not be increased appreciably, while that available to those concerned with aircraft safety would decrease both in quantity and reliability.

### ARGUMENT

#### EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT INCORPORATES THE RECOGNIZED CIVIL DISCOVERY PRIVILEGE FOR CONFIDENTIAL STATEMENTS MADE BY WITNESSES IN MILITARY AIR CRASH SAFETY INVESTIGATIONS

- A. Exemption 5 incorporates the privileges enjoyed by the government in the civil discovery context and thus protects the privileged statements at issue here

The plain language of Exemption 5, the legislative history of that provision, and prior decisions of this Court all show that the Freedom of Information Act was not intended to require disclosure of information normally privileged in the civil discovery context. The basis for the court of appeals' decision—that "Exemption 5 embraces only those civil discovery

privileges explicitly recognized in the legislative history" (Pet. App. 6a)—is therefore incorrect.

1. The starting point for analysis—the language of Exemption 5—certainly does not support the court of appeals' construction. Exemption 5 provides that the FOIA "does not apply to matters that are \* \* \* inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." It plainly means that a litigant cannot obtain under the FOIA documents that could not be obtained in civil discovery. Nothing in the language of this provision even remotely suggests that Congress intended to protect certain privileged materials but not others.

2.a. Nor is there any support for the court of appeals' interpretation in the legislative history. On the contrary, the Senate Report (S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965) (hereinafter "Senate Report")) states that the purpose of Exemption 5 "is to protect from disclosure \* \* \* *those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency*" (emphasis added). The Report goes on to note (*ibid.*; emphasis added) that "[t]his would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties." There is, however, nothing to suggest that these two examples were intended as an exhaustive list of the privileges incorporated into Exemption 5. Indeed, this Court has already held that the deliberative process and confidential commercial information privileges, which are not mentioned in this passage, are incorporated into Exemption 5 (*NLRB v. Sears, Roebuck & Co.*, *supra*, 421 U.S. at 150; *FOMC v. Merrill*, *supra*, 443 U.S. at 360).

In concluding that Exemption 5 incorporates only those privileges explicitly recognized in the legislative history, the court of appeals placed primary reliance upon the following passage in the Senate Report (at 9):

Exemption No. 5 relates to "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.

The court of appeals stated (Pet. App. 8a-9a, quoting Senate Report at 9) that "the Senate Report assumes that Exemption 5 would protect only 'legal or policy matters.' " In fact, however, the Report merely noted that agencies had objected to mandatory disclosure of documents discussing legal or policy matters and that Exemption 5, as amended, had been framed to protect such documents to the extent required for "efficient Government operation" (Senate Report at 9). While this passage in the Senate Report made no reference to other privileged documents, it does not follow, as the court of appeals concluded (Pet. App. 9a), that Exemption 5 was meant to protect only documents discussing legal matters.



First, that interpretation would be utterly inconsistent with the Senate committee's amendment of Exemption 5. In the bill referred to the committee (S. 1160, 89th Cong., 1st Sess. (1965)), Exemption 5 was restricted to documents "dealing solely with matters of law or policy," but the committee deleted that requirement and substituted language protecting documents that "would not be available by law to a private party in litigation with the agency." See Senate Report at 1. If Congress had intended to limit Exemption 5's coverage to "legal or policy matters," as the court of appeals maintained (Pet. App. 9a), Congress would not have adopted this amendment, which deleted that very restriction.<sup>16</sup>

Second, the court of appeals' interpretation is inconsistent with the previously noted statement in another part of the Senate Report (at 2) that Exemption 5 protects "the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties." Neither the attorney-client privilege nor the attorney

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<sup>16</sup> The court of appeals' explanation of this amendment is unconvincing. The court stated (Pet. App. 9a & n.17) that the only purpose of the amendment was to prevent compelled disclosure of documents containing both a discussion of legal or policy matters and factual information. That interpretation is belied both by the amendment's broad language and by the deletion of language expressly tying the Exemption to "matters of law or policy." If the amendment's only purpose had been to authorize nondisclosure of such documents, the word "solely" could simply have been deleted. The Exemption then would have applied to "inter-agency or intra-agency memorandum dealing \* \* \* with matters of law or policy." Or if the amendment had been intended to protect the non-factual portions of such documents, the committee could have easily so provided.

work-product privilege is limited to legal or policy matters; indeed, those privileges often apply to purely factual materials. See *Fisher v. United States*, 425 U.S. 391, 403 (1976) (attorney-client privilege protects information disclosed in confidence by a client to an attorney in order to obtain legal assistance); *Hickman v. Taylor*, 329 U.S. 495 (1947) (attorney work-product privilege applies to statements made to lawyer by accident witnesses).

b. The House Report (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (hereinafter "House Report")) also shows that Exemption 5 is not limited to the privileges mentioned in the legislative history. That Report states (*ibid.*) that under the FOIA "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." A corollary of this principle, of course, is that any internal memorandums or letters that would not routinely be disclosed to a private party in civil discovery need not be disclosed under the FOIA.<sup>17</sup>

The House Report mentions (at 10) certain specific types of materials covered by Exemption 5—i.e., "advice from staff assistants and the exchange of ideas among agency personal" and certain "documents or information which [an agency] has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation." Again, however, there is no reason to believe that this list was meant to be exhaustive, as the court of ap-

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<sup>17</sup> See *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 35 (1967).

peals maintained (Pet. App. 9a-10a).<sup>18</sup> The attorney-client and attorney work-product privileges were not mentioned, despite their incorporation into Exemption 5.<sup>19</sup> And the House Report expressly stated (at 10; emphasis added) that Exemption 5 was "intended to exempt from disclosure \* \* \* *other information and records* wherever necessary without, at the same time, permitting indiscriminate administrative secrecy."

3. Consistent with the statutory language and legislative history, this Court has observed that "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); accord, *FTC v. Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 7-8. In a similar vein, the Court has held that "it is reasonable to construe Exemption 5 to exempt *those documents* \* \* \* *normally privileged in the civil discovery context.*"

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<sup>18</sup> While acknowledging (Pet. App. 9a n.8, quoting House Report at 10) that "[t]he House Report speaks broadly of protecting the secrecy of 'documents or information which [a government agency] has received,'" the court of appeals stated (Pet. App. 9a-10a, quoting House Report at 10) that the House Report "contain[s] evidence that Exemption 5 was meant to protect only 'advice from staff assistants and the exchange of ideas among agency personnel.'" In fact, however, the House Report merely said (at 10) that agency witnesses had "contended, and with merit, that advice from staff assistants and the exchange of ideas among personnel would not be completely frank if they were forced to 'operate in a fishbowl.'" That statement did not purport to define the entire scope of Exemption 5's coverage.

<sup>19</sup> See S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965); *FTC v. Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 4; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975).

*NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); see also *FTC v. Grolier, Inc.*, *supra*, slip op. 7.

Moreover, this Court has repeatedly noted that "[t]he primary purpose of the FOIA was not to benefit private litigants or serve as a substitute for civil discovery." *Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14 (1982); see also *NLRB v. Sears, Roebuck & Co.*, *supra*, 421 U.S. at 143 n.10; *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). But if Exemption 5 incorporates only those privileges explicitly recognized in the legislative history, all other civil discovery privileges could be circumvented by use of the FOIA. A civil litigant denied discovery of materials protected by one of the privileges not mentioned in the legislative history could obtain those materials simply by filing a FOIA request. Those privileges would therefore be effectively abolished whenever the information sought is held by the government. Not only would this place the government at a disadvantage relative to other civil litigants, but it would significantly alter the scope of well-established privileges in federal and state suits involving only private parties.<sup>30</sup> It is most unlikely "that Congress would have intended such a result without clearly saying so." *Ruckelshaus v. Sierra Club*, No. 82-242 (July 1, 1983), slip op. 12.

4. The court of appeals' interpretation of Exemption 5 rested largely upon statements in *FOMC v. Merrill*, 443 U.S. 340 (1979). In *Merrill*, this Court prefaced its discussion by remarking that "*it is not*

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<sup>30</sup> In the present FOIA case, for example, respondents Weber Aircraft Corporation and Mills Manufacturing Corporation are seeking privileged information for use in private litigation.

clear that Exemption 5 was intended to incorporate every privilege known to civil discovery" (443 U.S. at 354; emphasis added). The Court also observed (*id.* at 355; emphasis added): "Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 *must be viewed with caution.*"

The court of appeals, however, read far more into *Merrill*. Stating (Pet. App. 6a, quoting 443 U.S. at 359) that the *Merrill* Court "found evidence in the House Report on the FOIA \* \* \* that Congress 'specifically contemplated a limited privilege for confidential commercial information,'" the court of appeals concluded (Pet. App. 6a; emphasis added):

As we read *Merrill*, this finding is the linchpin of the Court's analysis: *Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history.*

The court of appeals' interpretation of *Merrill* is erroneous and, indeed, is inconsistent with the decision in *Merrill* itself. The Court held in *Merrill* that Exemption 5 incorporated a qualified privilege for confidential commercial information, even though that privilege was *not* "explicitly recognized" in the legislative history. Relying upon a sentence in the House Report (at 10) referring to documents or information received by the government "before it completes the process of awarding a contract," the Court in *Merrill* concluded (443 U.S. at 359; emphasis added; footnote omitted): "[W]e think it is reasonable to infer that the House Report \* \* \* specifically contemplated a limited privilege for confidential com-

mercial information pertaining to such contracts." The Court went on to hold that the Federal Open Market Committee's Domestic Policy Directives are "at least potentially eligible for protection under Exemption 5" (*id.* at 360-361 n.23) and explained (*id.* at 361; emphasis added): "*Although the analogy is not exact*, we think that the Domestic Policy Directives and associated tolerance ranges are *substantially similar* to confidential commercial information generated in the process of awarding a contract." Thus, this Court's decision in *Merrill* was based upon "infer[ence]" and "analogy" rather than explicit recognition by Congress of the privilege at issue.<sup>21</sup>

Purporting to apply what it termed *Merrill*'s "new analysis of the interplay between Exemption 5 and civil litigation privileges" (Pet. App. 5a), the court of appeals found "no evidence in the legislative history that Congress intended Exemption 5 to protect witness statements given under a promise of confidentiality" (*id.* at 10a). As we show in point B, *infra*, such evidence does in fact exist. But even if the legislative history contained no mention of the privilege at issue in this case, it would not suggest that Congress did not intend to incorporate that privilege into Exemption 5.

As the Court observed in *Merrill* (443 U.S. at 355), "Congress specifically recognized that certain discovery privileges were incorporated into Exemptions 5." But as previously noted, Congress gave no

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<sup>21</sup> The Court noted (443 U.S. at 358 & n.21) that in hearings preceding enactment of the FOIA, the General Counsel of the Treasury Department expressed concern about premature disclosure of information concerning Federal Reserve open market operations.

indication that those examples were meant as an exhaustive list of the incorporated privileges. The privileges mentioned in the congressional committee reports—the deliberative process and attorney privileges—apply to a large volume of government records, and it is thus not surprising that they were singled out. It does not follow, however, that Congress' failure to enumerate the remaining privileges shows that Congress meant to exclude them from the protection of Exemption 5, contrary to the unequivocal language of that provision.

There are many obvious reasons why the congressional committees would have refrained from attempting to compile a complete list of the incorporated privileges. Since Exemption 5 by its terms embraces all internal memorandums or letters normally privileged in civil discovery, no such list was needed. In addition, such comprehensive treatment would not have been in keeping with the very brief treatment of Exemption 5 in the House and Senate Reports. Moreover, by attempting to publish a complete list, Congress would have risked omitting narrow but important privileges, such as the one at issue here. This risk was especially great because the privileges available under federal law were not and still are not codified. See Fed. R. Evid. 501. Furthermore, since the federal law of privileges has been permitted to evolve through adjudication, freezing the privileges incorporated into Exemption 5 might have led to divergence between the coverage of that provision and the privileges recognized in civil litigation. Finally, because the availability and scope of certain privileges has been hotly disputed,<sup>22</sup> an exhaustive list of privileges would have generated needless controversy.

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<sup>22</sup> This is illustrated by the controversy engendered by article V of the Federal Rules of Evidence as submitted to



5. In sum, "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *FTC v. Grolier, Inc.*, *supra*, slip op. 7-8, quoting *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, *supra*, 421 U.S. at 184. It follows, therefore, that the statements at issue in this case need not be disclosed under the FOIA. The privilege for confidential statements made to military air crash safety investigators has been well established for more than 20 years. See *Cooper v. Department of the Navy*, *supra*; *Brockway v. Department of the Air Force*, *supra*; *Machin v. Zuckert*, *supra*; *Rabbitt v. Department of the Air Force*, 401 F. Supp. 1206 (S.D.N.Y. 1974); *Kreindler v. Department of the Navy*, 363 F. Supp. 611 (S.D.N.Y. 1973); *McFadden v. Avco*, 278 F. Supp. 57 (M.D.Ala. 1967); *O'Keefe v. Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965). And there can be no serious question that the witness statements sought by respondents in this case fall within that privilege. An uncontroverted affidavit filed in district court established that the statements were obtained under a pledge of confidentiality in the course of an authorized Air Force safety investigation (J.A. 37-40), and the district court made implicit findings to that effect (Pet. App. 23a-25a).

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Congress by this Court. Because of the disagreement created by the nine specific nonconstitutional privileges enumerated in the proposed rules, Congress decided not to codify the privileges recognized by federal law. See Fed. R. Evid. 501. See also S. Rep. No. 93-1277, 93d Cong., 2d Sess. 6-7 (1974); 10 J. Moore & H. Bendix, *Federal Practice* §§ 500.03-500.14 (1982); 23 C. Wright & K. Graham, *Federal Practice & Procedure* § 5422, at 689 (1980); J. Weinstein, *Evidence* ¶ 501[01] (1982).

**B. Even if Exemption 5 does not incorporate every privilege recognized in civil discovery, it nevertheless protects confidential witness statements in a military air crash safety investigation**

Even if Exemption 5 does not incorporate every privilege recognized in civil discovery, the analysis employed by this Court in *Merrill* shows that the statements at issue here are nevertheless protected against mandatory public disclosure under the FOIA.

In *Merrill*, the Court reviewed the legislative history and found grounds to infer that Congress intended Exemption 5 to incorporate a limited privilege for confidential commercial information (443 U.S. at 357-359). The Court also observed (*id.* at 360) that "recognition of an Exemption 5 privilege for confidential commercial information generated in the process of awarding a contract would not substantially duplicate any other FOIA exemption." Here, too, there is strong evidence that Congress "specifically contemplated" (443 U.S. at 359) that the statements at issue would be protected, and the *Machin* privilege does not substantially duplicate any other FOIA exemption.

1.a. This Court has previously reviewed the legislative history of Exemption 5. See *FOMC v. Merrill*, *supra*, 443 U.S. at 357-358 & n.20; *EPA v. Mink*, 410 U.S. 73, 89-90 (1973). As noted, the original Senate bill (S. 1160, 89th Cong., 1st Sess. (1965)) did not contain the present Exemption 5 but instead included an exemption for "intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy." As this Court has remarked (*EPA v. Mink*, *supra*, 410 U.S. at 90-91; footnote omitted):

This formulation was designed to permit "[a]ll factual material in Government records . . . to

be made available to the public." S. Rep. No. 1219, 88th Cong., 2d Sess. 7 (1964). (Emphasis in original.) The formulation was severely criticized, however, on the ground that it would permit compelled disclosure of an otherwise private document simply because the document did not deal "solely" with legal or policy matters.

As a result of this criticism, Exemption 5 was changed to substantially its present form by the Senate committee. Senate Report at 1; see also *FOMC v. Merrill*, *supra*, 443 U.S. at 359; *EPA v. Mink*, *supra*, 410 U.S. at 91. The Senate Report explained (at 4) that the committee's amendment "reflect[ed] suggestions made to the committee in the course of the hearings," and it may reasonably be inferred that one of the suggestions that precipitated the amendment concerned the *Machin* privilege.

In a written statement to the Senate committee, the Defense Department referred to the very type of statements involved in this case as an "example[] of the kind[] of information or records which the Department of Defense now considers it essential to treat as privileged but which might not receive protection under [the bill then under consideration]." *Administrative Procedure Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 418 (1965) (hereinafter "*1965 Senate Hearings*"); see also *Federal Public Records Law: Hearings Before the Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 220 (1965) (hereinafter "*House Hearings*"). The Department wrote (*1965 Senate Hearings* at 418):

[I]nvestigative files such as aircraft accident  
\* investigation reports also contain invaluable in-

formation that is obtained only by the assurance that it will be treated as privileged. Judicial recognition of the necessity for protecting such information in aircraft accident investigation reports is found in such cases as *Machin v. Zuckert*, 316 F.2d 336 (C.A.D.C. 1963), where the legitimate interests of the Government in promoting air safety was recognized by the court as a valid reason for denying to the litigants access to the accident report. \* \* \* [T]he continued protection of the information obtained in the course of these exchanges is absolutely essential to the continued flow of information vital to the effective and efficient management of the Defense Establishment.<sup>[23]</sup>

See also *House Hearings* at 220.

Assistant Attorney General Schlei testified that the bill referred to the committee appeared to require, among other things, "the availability of information submitted in confidence to investigators in aircraft investigations \* \* \*. It is obvious that these changes are not intended by the proponents" (1965 *Senate Hearings* at 196). In his written statement, Assistant Attorney General Schlei elaborated (*id.* at 206):

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<sup>23</sup> The Defense Department also reiterated and endorsed (1965 *Senate Hearings* at 419) Professor Kenneth Culp Davis's statement during the 1964 Senate Hearings (*Administrative Procedure Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 248 (1964)), that the FOIA exemption provision as then framed "will do little if any good, and it will do an immense amount of harm. It will prevent agencies from receiving confidential information in writing from private parties, and for that reason it will not have the effect of opening up the confidential information to the public." See also *House Hearings* at 221.

It would seem evident that if persons interviewed by investigators are to have no assurance that what they divulge will not be published, the free flow of information necessary to the effective performance of regulatory, benefit, and other agency functions from complainants and witnesses surely will be seriously jeopardized. In many cases persons sought to be interviewed \* \* \* will refuse to talk to agency investigators and employees as soon as they realize that all information furnished by them may be made public.

See also *Administrative Procedure Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 212 (1964) (hereinafter "*1964 Senate Hearings*").

The Civil Aeronautics Board, which then had the responsibility for investigating the causes of civilian aircraft accidents,<sup>24</sup> objected because the predecessor of Exemption 5 under consideration was limited to "memorandums and letters dealing solely with matters of law or policy" and did not include those containing a discussion of facts. *1965 Senate Hearings* at 366-367. The Board also contended (*id.* at 367) that opening up "investigatory files developed in discharge of the Board's responsibility \* \* \* for ascertaining the cause of aircraft accidents, and making recommendations designed to avoid future such accidents \* \* \* would be contrary to the public interest

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<sup>24</sup> See Pub. L. No. 89-670, Sections 5(c) and 6(d), 80 Stat. 935, 938, which transferred that authority to the National Transportation Safety Board ("NTSB"), then a part of the Department of Transportation. For the NTSB's present responsibilities in this field, see 49 U.S.C. 1441-1443.

as well as impede the discharge of the Board's responsibilities in this area." See also *House Hearings* at 237.<sup>25</sup>

During the hearings preceding enactment of Exemption 5, no witness or member of Congress expressed the view that statements such as those involved here should be subject to mandatory disclosure. Thereafter, Exemption 5 was amended by the Senate committee to shield "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." See Senate Report at 9. Exemption 5 was enacted in this form (Pub. L. No. 89-487, Section 3(e), 80 Stat. 251) and remains essentially unchanged.<sup>26</sup>

In sum, we think it may fairly be inferred from the following facts that Exemption 5 was specifically intended to protect witness statements like those at issue in this case: such statements would not have been protected by the original bill but fall within the plain meaning of Exemption 5 as amended by the Senate committee and ultimately enacted; the Senate committee stated that its amendment was made in

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<sup>25</sup> The Board raised these objections even though its practice was to release almost all factual information concerning aircraft accidents (see *1965 Senate Hearings* at 366; *House Hearings* at 237). For a comparison of the use of confidential statements in military and civilian aircraft accident investigations, see page 36 note 29, *infra*.

<sup>26</sup> When the FOIA was codified in 1967, together with the other 1966 amendments to the Administrative Procedure Act, the words "a party other than an agency" were substituted for "private party" (Pub. L. No. 90-23, Section 1, 81 Stat. 55). See also H.R. Rep. No. 125, 90th Cong., 1st Sess. 2 (1967); S. Rep. No. 248, 90th Cong., 1st Sess. 2 (1967).

response to suggestions voiced at the committee hearings; a number of government witnesses at those hearings referred specifically to the very type of statements involved here, noted that such statements were apparently not shielded from compulsory disclosure under the bill then under consideration, and argued that disclosure of such statements should not be required; and no witness or member of Congress suggested during the hearings that mandatory disclosure of such statements was desirable. Thus, the analysis employed in *Merrill* leaves little doubt that the statements sought by respondents are protected from disclosure by Exemption 5. See *FOMC v. Merrill*, *supra*, 443 U.S. at 359.

b. The *Machin* privilege also does not "substantially duplicate any other FOIA exemption" (*FOMC v. Merrill*, *supra*, 443 U.S. at 360). In most instances, statements such as those at issue here are not classified documents (Exemption 1), do not relate solely to agency personnel rules or practices (Exemption 2), are not specifically exempted from disclosure by any other statute (Exemption 3), do not contain confidential or privileged trade secrets or commercial or financial information (Exemption 4), do not contain information "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy (Exemption 6), are not "investigatory records compiled for law enforcement purposes" (Exemption 7), are not contained in or related to reports prepared by, on behalf, or for the use of an agency that regulates or supervises financial institutions (Exemption 8). and do not contain "geological and geophysical information and data \* \* \* concerning wells" (Exemption 9).



2. Incorporation of the *Machin* privilege into Exemption 5 would be fully consistent with the purposes underlying the Freedom of Information Act.

To begin with, protecting confidential statements made to military air crash safety investigators would not contravene the "strong congressional aversion to 'secret [agency] law'" (*NLRB v. Sears, Roebuck & Co.*, *supra*, 421 U.S. at 153). Such statements are obviously not "law" because they are not rules that govern the adjudication of individual rights or require particular conduct or forbearance by the public. See *Cuneo v. Schlesinger*, 484 F.2d 1086, 1091 n.13 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

By the same token, the *Machin* privilege fully comports with the dual goals of the FOIA "to permit access to certain kinds of official information \* \* \* that ought to be public [while shielding] \* \* \* certain information where its confidentiality [is] necessary to protect legitimate governmental functions that would be impaired by disclosure." *Administrator, FAA v. Robertson*, 422 U.S. 255, 262 (1975). Although the Act "establish[es] a general philosophy of full agency disclosure," it also recognizes that it is "necessary for the very operation of our Government to allow it to keep confidential certain material" Senate Report at 3. The *Machin* privilege, as invoked by the military, sweeps no broader than is necessary to further compelling government interests.

From the outset, the *Machin* privilege has been applied only to a narrow category of information—statements made by witnesses in military air safety investigations in reliance upon promises of confidentiality, and "any conclusions that might be based in any fashion on such privileged information."

*Machin v. Zuckert*, *supra*, 316 F.2d at 339.<sup>27</sup> The privilege has been upheld because the courts have recognized that such statements could not be obtained without the assurance of confidentiality. *Id.* at 339; *Cooper v. Department of the Navy*, *supra*, 558 F.2d at 277; *Brockway v. Department of the Air Force*, *supra*, 518 F.2d at 1193. Other information—including the names of the witnesses, factual data generated by the safety investigation, and the record of the collateral investigation—is routinely released. See A.F. Reg. 127-4 (Jan. 1, 1973) (Pet. App. 31a-32a). Moreover, the privilege does not prevent witnesses in the safety investigation from being asked to testify elsewhere, and they are permitted to refresh their memories prior to such testimony by reviewing the statements made by them to the safety board. See *Brockway v. Department of the Air Force*, *supra*, 518 F.2d at 1186; *Rabbitt v. Department of the Air Force*, *supra*, 401 F. Supp. at 1209. In addition, mindful of the need to release as much information as possible regarding air crash investigations, the Air Force in 1972 restructured and expanded its collateral investigations in order to create a more comprehensive public record for the use of litigants and others and to obviate any perceived need for public access to confidential witness statements. See A.F. Reg. 110-14 (Feb. 29, 1972); see also Burton, *supra*, 14 JAG L. Rev. at 233-

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<sup>27</sup> Other privileges, such as the deliberative process privilege, may cover other information gathered in investigations of aircraft mishaps. See Pet. App. 12a; *United States v. Reynolds*, 345 U.S. 1 (1953) (military secrets); *Machin v. Zuckert*, *supra*, 316 F.2d at 339 (deliberative process privilege).

234.<sup>28</sup> The *Machin* privilege, therefore, does not operate to reduce the amount of information available to the public. Rather, the privilege simply makes it possible for the government to obtain information that would otherwise be unavailable to anyone for any purpose (*Cooper v. Department of Navy, supra*, 558 F.2d at 277) and that is crucial to the performance of an essential government function.

In short, no purpose of the FOIA would be served by mandatory disclosure of the confidential witness statements furnished to military air crash safety investigators. Exemptions to the FOIA must be given a reasonable interpretation in order to accomplish the purposes of the Act. See *Department of State v. Washington Post Co.*, 456 U.S. 595 (1982); *FBI v. Abramson*, 456 U.S. 615 (1982). The FOIA's overriding goals are to promote open government (*Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974)) and "to ensure an informed citizenry \* \* \* [in order] to hold the governors accountable to the governed" (*NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). But disclosure of confidential statements made to military safety investigators is unlikely to promote open government, an informed citizenry, or any other beneficial purpose. If confidentiality cannot be ensured, statements provided as part of a safety investigation will not reveal anything beyond that uncovered by the parallel collateral investigation. As a result, the information available to the public will not be increased appreciably, while the information available to those charged

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<sup>28</sup> These procedures were in effect at the time of the accident giving rise to this litigation.

with achieving aircraft safety will decrease both in quantity and reliability.

3. As previously noted, the court of appeals' construction of Exemption 5 was based primarily upon the Senate and House Reports and this Court's decision in *Merrill*, all of which we have already discussed. The court's remaining reasons for requiring disclosure of confidential witness statements under the FOIA are also unpersuasive.

The court of appeals relied (Pet. App. 10a) upon the statement in *EPA v. Mink*, *supra*, 410 U.S. at 89, that Exemption 5 "requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual investigative matters on the other." However, the point of the statement in *Mink* was that the scope of the deliberative process privilege is no greater under the FOIA than in civil litigation, where "memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties" (410 U.S. at 87-88). *Mink* certainly did not hold that this limitation upon the deliberative process privilege applies to all other privileges incorporated into Exemption 5. In fact, as noted above (see pages 17-18, *supra*), the Exemption unquestionably covers purely factual material protected by the attorney-client or work-product privilege.

Finally, the court of appeals (Pet. App. 17a-18a & n.12), like respondents (Weber Br. in Opp. 9-10; Mills Br. in Opp. 17-19), suggested that the government failed to establish that releasing statements such as those at issue here would impair military aircraft safety. However, the government had no obligation

in this case to prove that there is a sound empirical basis for the *Machin* privilege; the only issue is whether that privilege was incorporated into Exemption 5. In any event, common sense and the affidavits submitted below (see pages 7-8, *supra*) amply support the proposition that witnesses are more likely to be candid when their statements are made under premises of confidentiality. As the Fifth Circuit aptly put it (*Cooper v. Department of the Navy, supra*, 558 F.2d at 277):

[I]n the circumstances of an aircraft accident investigation, assurances of confidentiality may be especially needed to obtain full disclosures. After all, something has gone wrong—perhaps gravely, even mortally wrong—under circumstances inherently dangerous. The machines and the procedures being employed are generally uniform and will be employed again tomorrow in the same manner unless altered. Is there something wrong with them generally? Or did the mishap (or catastrophe) occur because of a particular defect in a particular machine? Does a crew-chief believe (though not with enough confidence to swear to it) that a pilot was unwell or distracted on the occasion of a fatal flight? Does he recall that he forgot to secure some important assembly of the craft before the flight? To permit a breach of assurances of confidentiality given in order to obtain answers to such questions as these may perhaps provide access to more information in that particular case, but common sense tells us that it will likely also assure that in future cases such information will never see the light of day and will be of use to no one. Logic argues, then, that in such a circumstance as the Aircraft Accident Safety

Investigation, where [promises] of confidentiality have been found helpful and perhaps essential to obtaining information upon which to base corrective action, those promises should be respected and the answers and speculations which they produce shielded from disclosure.

See also *Brockway v. Department of the Air Force*, *supra*, 518 F.2d at 1194.<sup>29</sup>

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<sup>29</sup> Respondent Weber Aircraft Corporation has argued (Br. in Opp. 9-10, 19-20) that the *Machin* privilege is unnecessary because witness statements taken by the National Transportation Safety Board, which investigates civilian aircraft accidents, are not privileged. This argument, however, has little if any bearing upon the question whether the *Machin* privilege is incorporated into Exemption 5. Moreover, fundamental differences between the NTSB's procedures and those of military investigators make facile comparisons concerning the treatment of witness statements of minimal value. For example, witnesses may be compelled to testify in NTSB investigations (see 49 C.F.R. 845.21(c)), whereas military investigators conducting safety investigations lack authority to subpoena witnesses (see page 3 & note 3, *supra*) and must therefore rely upon promises of confidentiality to obtain cooperation. The NTSB's reports may not be used in litigation concerning the accident (49 U.S.C. 1441(e)), and the NTSB is not required to release any document protected under FOIA exemptions (49 U.S.C. 1905). Thus, while statements furnished directly to the NTSB may be released, if our interpretation of Exemption 5 is correct, the NTSB would not be required to release the statements involved in this case if supplied to it by the military.

Furthermore, the authorities responsible for civilian aircraft safety have recognized that information furnished in confidence by pilots, air traffic controllers, and others may be of vital importance in preventing accidents and loss of life. Under the Aviation Safety Reporting Program, the National Aeronautics and Space Administration receives information relating to aviation safety and, to preserve confidentiality,

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1983

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removes all identifying details as soon as possible. Based upon this information, NASA prepares reports, statistical summaries, and recommendations for the Federal Aviation Administration and other agencies with responsibilities in the field. See 44 Fed. Reg. 24980-24982 (1979). Periodic evaluations of this program have concluded that confidentiality is essential to its success. NASA Advisory Subcomm. on Aviation Safety Reporting System, *Supplementary Report on ASRS Utility and Effectiveness* 11-12 (1981); NASA Advisory Subcomm. on Aviation Safety Reporting System, *Report on ASRS Utility and Effectiveness* 6, 11 (1979); NASA Research and Technology Advisory Council, *Evaluation of Aviation Safety Reporting System* 24 (1977).



## APPENDIX

Air Force Regulation 127-4 (Jan. 18, 1980) provides in pertinent part:

2-4. Limitations on the Use of Safety Reports. The Air Force investigates mishaps to find the causes and prevent recurrence. Investigators, witnesses, and people who work with safety reports need to know the limitations placed on using the reports.

a. Aircraft, Missile, and Nuclear Safety Mishap Reports. These are limited-use reports. The sole purpose of these reports, their attachments, and related documents is to prevent mishap recurrence. No other use is authorized.

\* \* \* \* \*

2-5. Limited-Use Reports. The Air Force claim of privilege for limited-use reports stems from Executive privilege. This is based on the constitutional provisions for separation of powers among the three branches of government. The claim of privilege for mishap reports (commonly referred to as evidentiary privilege) is based on the larger claim of Executive privilege. Evidentiary privilege is needed to make sure our reports effectively prevent mishap recurrence and thereby strengthen combat capability. Therefore the following procedures and restrictions apply to limited-use reports.

a. The Promise of Confidentiality. These reports and all related documents are prepared by, for, or at the direction of The Inspector General, US Air Force. They are internal communications of the Air Force, pertaining to safety, and their only purpose is to prevent mishaps. In-

investigators need to assess all available evidence to best serve this purpose. Such evidence includes information known by persons directly or indirectly involved in mishaps. Frank and open exchange of such information is vital in determining causes and recommending corrective actions. Therefore, a promise of confidentiality is given to all persons who give information to investigators of weapon systems mishaps. To back up this promise, the claim of privilege is made for these reports, including messages and other related documents.

b. Prohibitions on Use Within the Air Force. These reports and their attachments may not be used as evidence for disciplinary action, nor as evidence in determining the misconduct or line-of-duty status of any personnel. Using them as evidence before flying evaluation boards or to determine pecuniary liability is also prohibited. Finally, except as stated in d below, they may not be used as evidence to determine liability in claims against the US Government.

c. Prohibitions on Disclosure Outside the Air Force. These reports and their attachments are not released outside the Air Force for purposes of litigation, except as in d below. This includes requests from the Department of Justice or any US Attorney. These prohibitions include any action by or against the US. Limited-use reports are used solely within the Air Force to prevent mishaps. They are not appended to nor enclosed in any other report or document unless the sole purpose is to prevent mishaps. This prohibition includes preliminary, supplemental, and progress reports and part II of formal reports on AF

Forms 711. It also applies to special mishap investigation reports and evaluations prepared by the Directorate of Aerospace Safety.

d. Conditions for Limited Disclosure. Despite the above restrictions, the factual parts of limited-use mishap reports must be released in certain cases. These factual parts consist essentially of part I of the formal report. They are released as follows:

(1) As required by the Freedom of Information Act (5 U.S.C. 552, as amended by Public Law 93-502). The disclosure authority for requests made under the Freedom of Information Act is the Commander, Air Force Inspection and Safety Center. (See AFR 12-30, tables 1 and 2, and paragraph 12.) Send requests to HQ AFISC/DADF, Norton AFB CA 92409.

(2) If there is an AFR 110-14 investigation of the same mishap, the safety investigator(s) gives the accident investigator the factual material in part I of the formal report. (See AFR 110-14 and paragraph 3-8e of this regulation.)

(3) Federal law also requires that a person who is accused in a trial by court martial will, upon proper court order, be given certain material. That person should be furnished all statements, sworn or unsworn, in any form which have been given to any federal agent, employee, investigating officer, or board by any witness who testifies against the accused.

\* \* \* \* \*

### 3-8. Investigative Evidence:

\* \* \* \* \*

d. Witnesses. Physical and documentary evidence are the most credible forms of evidence.

However, the accounts of witnesses often provide important (and sometimes the only) leads as to the causes. Witnesses include those involved in the mishap, those who only saw it, and those whose training and experience qualifies them as experts. The appearance of witnesses before an investigator or board is governed by the following:

\* \* \* \* \*

(3) Witnesses in aircraft, missile, or nuclear safety investigations are advised before testifying of the purpose of the investigation. The sole purpose of the investigation is to determine all factors relating to the mishap in order to preclude recurrence. The basis for this advice is the Air Force claim of privilege for the statements given in confidence by these witnesses (paragraph 2-5). It is a guarantee of confidentiality and is given to encourage frank and open communications.

\* \* \* \* \*

5-1. a. The Two-Part Report. The formal report has two parts: Part I, Facts, and part II, Non-factual Data. The AF Forms 711 are designed for two functions. First they show needed information for use in mishap prevention. The second function is to segregate factual information which may be disclosed outside the Air Force. In this way, the two-part report aids retention of privileged information and protects the privacy of medical information.

\* \* \* \* \*

5-2. What to Include in the Two-Part Report. The following describes the forms and other data normally needed and tells which tabs to place

them under. Sometimes the circumstances of a mishap are such that certain normally required forms or exhibits would not add to the report. When this is the case, AFISC will consider a request to omit them. Requests should be submitted by message to HQ AFISC/SER.

a. Part I—Facts:

\* \* \* \* \*

b. Part II—Board of Investigator Analysis:

(1) Tab T, Investigation, Analysis, Findings, and Recommendations. This is the most important part of the report. It draws on all portions of the report to provide a complete picture of what happened. This is followed by a thorough analysis of all evidence, then findings, causes and recommendations. This section records the opinions of the board. It should accept or reject all evidence in the report. Only in the case of a formal minority report should there be differing findings, causes, or recommendations. Chapter 12 deals with this portion of the report in more detail. (Note: For aircraft nonflight mishaps, place the AF Form 711ab at this tab.)

(2) Tab U, Statements and Testimony of Witnesses and Persons Involved. Statements should be taken from all individuals concerned with the mishap or who were eyewitnesses to it. (The locally reproduced statement format in attachment 3 is used in formal limited-use reports.) If more than one statement is obtained from an individual, all should be included at this tab. The board may select for inclusion those statements and testimony that are meaningful. It is not always necessary to include all statements. However, a complete list of all witnesses con-

tacted is provided to the accident investigation. When an individual gives further testimony before the board, that too is included at this tab. The statements and testimony of each individual are placed together in chronological order with the earliest on top. Their proximity makes it easier to compare the individual's impressions. All statements and testimony included at this tab must be considered in the analysis at tab T.

(3) Tab V, Rebuttals. When an Air Force individual is cited as causal in a mishap, he or she may rebut the conclusion. The individual submits either a statement of rebuttal or a statement declining rebuttal (attachment 4). Refer to paragraph 2-10 for details. This does not apply to ground or explosives mishaps, unless they involve Air Force aircraft or missiles.

(4) Tab W, Technical and Engineering Evaluations of Material (Contractors). Engineering evaluations and TDRs done by contractors are privileged. They are included at this tab. Technical evaluations by contractor personnel assisting the board are included here and considered by the board in its analysis.

(5) Tab X, AF Form 711f, Nuclear Accident/Incident Report, is submitted on:

- (a) Nuclear accidents and incidents.
- (b) Flight and missile mishaps in which nuclear material is also involved.

(6) Tab Y, AF Form 711gA and B, Life Sciences Report of an Individual Involved in an AF Accident/Incident. Submit these forms as explained in chapter 11.

(7) Tab Z, Board Proceedings. Use of this tab is optional. Investigation boards may use this tab to tell reviewing agencies about investigation problems and to make recommendations for improving reporting and investigating procedures. Comments on technical circumstance which was coordinated through AFISC are still appropriate.



## Attachment 3

*WITNESS STATEMENT FORMAT*

I, \_\_\_\_\_ (Name) \_\_\_\_\_, Rank \_\_\_\_\_  
 \_\_\_\_\_ (Organization) \_\_\_\_\_, having first been  
 advised that this investigation is being conducted  
 solely for mishap prevention purposes within the  
 US Air Force and that this statement will not be  
 disseminated outside the US Air Force or used  
 as evidence in disciplinary actions or adverse  
 administrative actions such as a Flying Evalua-  
 tion Board, determining line-of-duty status or  
 pecuniary liability or elimination from the US  
 Air Force, but is to determine all factors relating  
 to the mishap and to avert recurrence, do here-  
 by make the following statement.

(For aircraft, missiles, or nuclear mishaps. This  
 attachment depicts the approved format, except  
 for size, and its content only. Use 8½- by 14-inch  
 paper for inclusion in mishap reports.)

**FOR OFFICIAL USE ONLY**

This is a limited-use document not releasable in  
 whole or in part to persons or agencies outside  
 the Air Force without the express approval of the  
 disclosure authorities specified in AFR 127-4.

Air Force Regulation 110-14 (July 18, 1977) pro-  
 vides in pertinent part:

**INVESTIGATIONS OF  
 AIRCRAFT AND MISSILE ACCIDENTS**

This regulation states policy, establishes respon-  
 sibilities, and prescribes uniform procedures for  
 conducting and reporting aircraft and missile  
 "accident investigations" other than "safety in-

vestigations" prescribed by AFR 127-4. It applies to all US Air Force activities.

\* \* \* \* \*

1. Terms Explained:

a. Aircraft or Missile Accident Investigation. An investigation of an aircraft or missile accident conducted by an officer or board appointed under this regulation. It is to preserve available evidence for use in claims, litigation, disciplinary actions, administrative proceedings, and all other purposes.

b. Safety Investigation. An investigation of an aircraft or missile accident conducted by an officer or board appointed under AFR 127-4 and used solely for accident prevention.

2. Air Force Policy on the Investigation of Aircraft and Missile Accidents. Aircraft or Missile Accident Investigations under this regulation are separate and apart from Aircraft or Missile Safety Investigations under AFR 127-4. Safety Investigations under AFR 127-4 take priority over other investigations in interviewing witnesses, obtaining and analyzing evidence, and inspecting the scene of the accident. Investigations directed under this regulation are conducted at the same time as, but do not interfere with, Safety Investigations. The following rules apply:

a. These reports are completely released to the news media, litigants, Congressmen, and other members of the general public on request and payment of applicable fees.

b. Members of the Safety Investigation Board are not assigned to conduct an Aircraft or Missile Accident Investigation of the same accident in any capacity.

c. Officers assigned to conduct an investigation under this regulation may not attend the Safety Investigation Board proceedings.

d. Officers currently assigned and performing safety duties should not be appointed to conduct an investigation under this regulation.

e. Testimony, in any form, given to the Safety Investigation Board may not be used or compared—either in whole or in part—by anyone conducting this investigation. Testimony to the Safety Investigation Board is given with the understanding that it will be used only for accident prevention purposes.

f. Witnesses who appeared before a Safety Investigation Board must not:

- (1) Reveal what testimony, opinions, analyses, speculations, or recommendations they gave to the Safety Investigation Board.

- (2) Disclose what testimony, findings, recommendations, or cause factors are in a Safety Investigation Report. These restrictions apply to any person who may have knowledge of a Safety Investigation Report and who may be called as a witness before any other proceedings (such as an Aircraft or Missile Accident Investigation). All witnesses in this investigation must be informed of its nature and of the possible use of such

testimony in adverse actions, litigation, and claims. This is to make sure that they are fully aware of the differences between the two investigations. See attachment 3 for a sample advice.

\* \* \* \* \*

#### 6. Investigative Procedures:

a. The President of the Aircraft or Missile Accident Investigation Board or the Investigating Officer should follow the preliminary steps outlined in attachment 1.

b. The purpose of the Aircraft or Missile Accident Investigation is to gather all relevant facts and records regarding a particular accident in a single report. Because this investigation is factual in nature, the opinions, conclusions, and recommendations of the investigator must not be included in the report. A factual summary of the evidence must be included in the report.

c. The President of the Safety Investigation Board provides the Aircraft or Missile Accident Investigator with the required number of copies of Part I of the Safety Report. He will include all original records in Part I that have been obtained by the Safety Investigation Board and a list of all witnesses who testified or provided statements to the Safety Investigation Board. Documents in Part I of the Safety Investigation Report should be provided to the Aircraft or Missile Accident Investigator as they become available. The President of the Safety Investigation Board also notifies the board or investigating officer under this reg-

ulation when the Safety Board has released the wreckage.

d. Witnesses' statements, testimony, data provided in confidence by manufacturers, board proceedings, findings, conclusions, opinions, and recommendations in the Safety Board Report must not be released to an Aircraft or Missile Accident Board or Investigating Officer.

e. Witnesses:

(1) May not testify in this investigation until they have been released by the Safety Investigation Board.

(2) Should be interviewed as soon as they are released by the President of the Safety Investigation Board.

(3) If suspected of a criminal offense, are advised of their constitutional rights, or of the provisions of UCMJ, Article 31, as appropriate (see attachment 3).

(4) Members or employees of the US Air Force must appear when called by the President of the Aircraft or Missile Accident Investigation Board or the Investigating Officer, as applicable.

(5) Members or employees of the US Air Force must testify under oath or affirmation, unless they refuse to testify on grounds of self-incrimination (see attachment 3).

f. Commanders make technical advisors (for example, maintenance, medical, legal, personnel, etc.) available to investigators. Such advisors need not be appointed on orders and will perform duties as determined

necessary by the Aircraft or Missile Accident Investigation Board or investigator.

\* \* \* \* \*

### Attachment 3

#### ADVICE TO WITNESSES

I am \_\_\_\_\_. (I am) (We are) appointed to conduct an accident investigation which will gather all the facts and circumstances surrounding the \_\_\_\_\_ (aircraft) (missile) accident which occurred on \_\_\_\_\_ near \_\_\_\_\_. This investigation is separate and apart from the safety investigation conducted under AFR 127-4. The purpose of this accident investigation is to obtain and preserve all available evidence for use in claims, litigation, disciplinary actions, adverse administrative proceedings, and for all other purposes. Testimony before the safety aircraft accident investigation board is given with the understanding that it cannot be used for other than mishap prevention purposes and all witnesses are advised that it will be treated in confidence. However, testimony given in this accident investigation may be used for any purpose deemed appropriate by competent authority, and may be publicly disseminated. Do you understand the difference between the safety investigation and this accident investigation?

\* \* \* \* \*

DEC 9 1983

ALEXANDER L. STEVAS,  
CLERK

No. 82-1616  
IN THE  
**Supreme Court of the United States**

October Term, 1983

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

WEBER AIRCRAFT CORPORATION, *et al.*,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT.

**BRIEF FOR RESPONDENT,  
WEBER AIRCRAFT CORPORATION.**

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No. 82-1616  
IN THE  
**Supreme Court of the United States**

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October Term, 1983

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UNITED STATES OF AMERICA,

*Petitioner,*

vs.

WEBER AIRCRAFT CORPORATION, *et al.*,

*Respondent.*

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**BRIEF FOR RESPONDENT,  
WEBER AIRCRAFT CORPORATION.**

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**I.**

**STATEMENT OF THE CASE.**

On October 9, 1973, Captain Richard Hoover (hereinafter "Hoover") ejected from a disabled fighter aircraft. As a result of injuries received upon his ground impact, he became a paraplegic.

He subsequently sued six defendants, alleging that his injuries were the result of defects in his parachute assembly. Included among those defendants is respondent Weber Aircraft Corporation,<sup>1</sup> which is alleged to have negligently designed a portion of the parachute assembly.

In deposition, Hoover testified, as he had during the Air Force legal investigation, that he had assumed the correct landing position and landed on his feet. He testified that he

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<sup>1</sup>Respondent Weber Aircraft Corporation is a wholly-owned subsidiary of Walter Kidde & Company, Inc.

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did nothing wrong, and that his injuries were due to an excessive descent rate.

At a subsequent deposition, Air Force employee John F. Findley testified and, pursuant to valid subpoena, produced, without objection, a number of documents which were examined by all parties present. Those documents contained a *verbatim* statement given by Hoover to the Air Force safety board, in which he testified that he had failed to execute the proper maneuver on landing and, contrary to his deposition testimony, had raised his knees in a crouch and landed, not on his feet, but on an undeployed seat kit. Also produced were documents setting forth the safety board's conclusion that Hoover's injuries were due to *Air Force personnel error* in reassembling the seat kit disconnect mechanism. These documents were subsequently seized from the court reported by the Air Force following a "reminder" to the Air Force that the documents contained portions of a "privileged" safety report.

In a previous deposition, Airman Sammy Dickson, the last parachute rigger to work on Hoover's parachute assembly prior to the accident, testified that he had done no work involving the disconnect mechanism.

Airman Dickson's supervisor subsequently testified that it was physically impossible to conduct the work that Airman Dickson was supposed to have done without having disassembled, and then reassembled, the disconnect mechanism. Following the accident, Dickson was permanently barred from ever again working on personnel parachutes.

Respondent subsequently requested Hoover's and Dickson's statements to the safety board pursuant to the Freedom of Information Act ("FOIA"), and the Air Force asserted an Exemption 5 privilege. Respondent brought suit to compel the production of these documents (J.A. at 8-12), and

the trial court entered summary judgment for the government (the trial court's Findings of Fact and Conclusions of Law are set forth at Pet. App. 21a), finding that the statements were privileged under *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 (1963), and thus fell within the scope of Exemption 5.

Respondent appealed to the Ninth Circuit, which reversed, relying on *FOMC v. Merrill*, 443 U.S. 340 (1979), which held that Exemption 5 covered only those civil discovery privileges which the legislative history showed were contemplated by Congress, and finding that the legislative history showed no evidence that Exemption 5 was intended to include the *Machin* privilege. *Weber Aircraft Corp. v. U.S.*, 688 F.2d 638 (9th Cir. 1982). It is that ruling which the government petitions this Court to reverse.

## II.

### SUMMARY OF ARGUMENT.

When Congress enacted FOIA, it was attempting to remedy years of improper withholding of information by the government under such vague standards as "requiring secrecy in the public interest". It did so by enacting a broad mandate that all information be released unless it falls within nine exemptions, which were exclusive and to be narrowly construed.

In enacting Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency", Congress sought primarily to protect the quality of the government's decision-making by shielding from disclosure all documents generated within an agency which contained the give-and-take of the decision-making process, *i.e.*, memoranda setting forth advice, opinions, analysis, or policy. The legislative history makes

it clear that Congress did not intend to protect documents which were received from outside the agency or which related purely to factual matters, such as the witness statements here at issue.

There was no intent to incorporate within Exemption 5 every privilege known to civil discovery, and especially no intent to include the *Machin* privilege for confidential statements given to military aircraft accident safety investigation boards, which was based on the very standard of interference with agency effectiveness which FOIA was intended to abolish.

On the contrary, the legislative history of Exemption 7 shows a clear rejection by the Congress of a request by the government, and particularly by the Defense Department, to amend Exemption 7 to include the *Machin* privilege. Despite a specific reference to *Machin* and to the witness statements here at issue as documents which should be protected, Congress refused to extend the scope of Exemption 7 to cover such materials, but instead enacted an exemption limited solely to "investigatory records compiled for law enforcement purposes". Had Congress intended to protect allegedly confidential non-law enforcement investigatory records, it could easily have said so in Exemption 7. The clear implication is that such records are not protected by the Act.

The legislative history of Exemption 3 reinforces this conclusion. Following this Court's decision in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975), which allowed the FAA to withhold information received under a promise of confidentiality when required in "the interest of the public", Congress immediately amended Exemption 3 to restrict such withholding to situations in which a statute either flatly prohibited release of the information, or contained particular criteria for withholding or reference to particular

types of material to be withheld. In other words, unless Congress gave specific direction to the agency as to how or what to withhold, the information must be released. This history is, again, completely contrary to the thrust of the government's argument here.

In addition to the legislative history of FOIA, other Congressional action shows the clear intent of Congress that information such as witness statements be disclosed. Congress has twice refused, in 1980 and 1983, to enact specific legislation that would bring these statements under Exemption 3, stating that the matter "requires further study". And, in the case of the FAA and NTSB, which perform the identical task of accident investigation for civilian aircraft accidents, Congress has specifically directed that such information be disclosed and has, in fact, amended the FAA's and NTSB's governing statutes to remove the discretion to withhold which they once contained.

The Congress has thus refused to enact legislation to shield the witness statements which are here at issue, and has directed their disclosure in the parallel civilian investigations. There is no essential difference between either the civilian accidents or witnesses and those in the military that would lead to any inference that Congress wishes to treat them any differently.

Moreover, even if such statements were subject to Exemption 5, the government has failed to meet its burden of proof that the statements were in fact given pursuant to a promise of confidentiality, or that any safety issue is in fact presented by their release.

Finally, the equities of this case mandate the disclosure of these statements in any event, due to the waiver of the privilege by the government and the overriding interest of the judicial system in preventing perjury.

### III. ARGUMENT.

#### A. EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT DOES NOT INCORPORATE A DISCOVERY PRIVILEGE FOR STATEMENTS MADE BY WITNESSES IN MILITARY AIR CRASH SAFETY INVESTIGATIONS.

##### 1. The Act Mandates Disclosures Unless the Witness Statements Fall Under One of the Nine Exclusive Narrow Exemptions.

In enacting the Freedom of Information Act ("FOIA"), Congress enacted a broad mandate to all government agencies, including the Department of Defense, to disclose to the public all information in their possession, so as to ensure an informed electorate capable of knowledgeably deciding matters of public interest. S. Rep. No. 813, 89th Cong., 1st Sess. 2-3, 10 (1965) ("*1965 Senate Report*"); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 12 (1966) ("*1966 House Report*"); *FBI v. Abramson*, 456 U.S. 615, 621 (1982). It sought to "permit access to official information long unnecessarily shielded from view"; *EPA v. Mink*, 410 U.S. 73, 79-80 (1978), "to check against corruption and to hold the governors accountable to the governed", *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), and to prevent agencies from "hid[ing] mistakes or irregularities committed by the agency," *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 385 (1980).

This mandate is limited only by nine explicitly exclusive exemptions intended to set up concrete, workable standards for determining what information must be disclosed. 5 U.S.C. § 552(c); *EPA v. Mink*, *supra*, at 79; *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975); *Administrator, FAA v. Robertson*, 422 U.S. 255, 262 (1975); *FOMC v. Merrill*, 443 U.S. 340, 351-52 (1979). The ex-

emptions are to be narrowly construed. *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *FBI v. Abramson*, *supra*, at 630. "When in doubt, the department or agency was supposed to lean toward disclosure, not withholding." "Administration of the Freedom of Information Act", 21st Report of the Committee on Government Operations, H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 7 (1972).

The Act was specifically intended to abolish agency withholding of documents "required for good cause to be held confidential" or "requiring secrecy in the public interest". 1965 *Senate Report* at 3.

Against this background, it is clear that Exemption 5 cannot have been intended to include a pre-FOIA discovery "privilege" that was judicially created based solely on the concept of government efficiency.

## **2. The Witness Statements Do Not Fall Under Exemption 5.**

### **(a) The Witness Statements Are Not Intra-Agency Memoranda Subject to Exemption 5.**

The government seeks a ruling from this Court that *every* witness statement received by a military accident investigation board is privileged under Exemption 5, no matter what its source. This argument seeks an interpretation of Exemption 5 which is inconsistent with its express language.

"Exemption 5 . . . applies only to documents that (a) are 'inter-agency or intra-agency memorandums or letters,' " *FOMC v. Merrill*, 443 U.S. 340, 351 (1979), and is "a provision intended to protect the confidentiality of purely *internal* governmental deliberations," H.R. Conf. Rep. No. 94-144, 94th Cong., 2d Sess., 26 (1976) (emphasis in the original).



This restriction in the express language of Exemption 5 in itself excludes witness statements given to military accident boards, as these statements often are received from persons who are not members of the armed forces or even government employees, such as civilian witnesses, injured parties, and contractor representatives. These statements clearly could not be construed to be protected by Exemption 5 without an expansive interpretation of the words "inter-agency" and "intra-agency", which would violate "the oft-repeated caveat that FOIA exemptions are to be narrowly construed". *FBI v. Abramson*, *supra*, at 630.

**(b) The Witness Statements Are Purely Factual Materials Which Exemption 5 Was Not Intended to Protect.**

As the legislative history and prior decisions of this Court clearly set forth, the purpose of Exemption 5 was to protect the government's executive privilege against the disclosure of pre-decisional advice, opinions and discussions concerning the development of legal and policy matters. Exemption 5 was never intended to prevent the disclosure of purely factual investigative matters, such as the witness reports at issue.

As initially proposed and passed by the Senate, Exemption 5 would have protected only those documents "dealing solely with matters of law or policy."<sup>2</sup> As this Court stated in *EPA v. Mink*, *supra*, at 90-91:

This formulation was designed to permit "[a]ll *factual* material in Government records . . . to be made available to the public." The formulation was severely

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<sup>2</sup>During the 1964 Senate floor debate on S1666, the Senate rejected an amendment offered to amend this to "dealing with matters of fact, law or policy". *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, Subcomm. on Administrative Practices and Procedure of the Comm. on the Judiciary, U.S. Senate, 93d Cong., 2d Sess. 110-11 (1974).

criticized, however, on the ground that it would permit compelled disclosure of an otherwise private document simply because the document did not deal "solely" with legal or policy matters. Documents dealing with mixed questions of fact, law, and policy would inevitably, under the proposed exemption, become available to the public. As a result of this criticism, Exemption 5 was changed to substantially its present form.

This Court has consistently held that Exemption 5, as finally enacted, was primarily intended to protect the government's executive privilege.<sup>3</sup> See, e.g., *EPA v. Mink*, *supra*, at 87-89; *N.L.R.B. v. Sears Roebuck & Co.*, *supra*, at 150. It has also consistently held that that privilege, and hence Exemption 5, does not apply to purely factual material.

In *EPA v. Mink*, *supra*, the Court found that Congress "legislated against the backdrop of . . . case law", *id.* at 89, under which "purely factual material . . . would generally be available for discovery", *id.* at 88. It then stated:

Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.

*Nothing in the legislative history of Exemption 5 is contrary to such a construction.* [*Id.* at 89 (emphasis added).]

Access to material under Exemption 5 thus "extended to and continues to extend to the discovery of purely factual material". *Id.* at 91.

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<sup>3</sup>The amendment to Exemption 5 was also intended to protect documents which would have been subject to the attorney-client and attorney work product privileges. S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965)

What is protected by Exemption 5 are documents reflecting "the decision-making process of government agencies". *N.L.R.B. v. Sears Roebuck & Co.*, *supra*, at 150. These documents have been described by this court as "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated", "which reflect the agency's group thinking in the process of working out its policy", *id.* at 153, "internal agency deliberations" and "advice, including analysis, reports, and expression of opinion within the agency", *FOMC v. Merrill*, *supra*, at 359, 360, and "the give-and-take of the decisional process", *FBI v. Abramson*, *supra* at 630.

As this Court recently summarized:

As our cases interpreting Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), make clear, this privilege would not protect merely "factual" material, but only "deliberative or policymaking processes."

*Herbert v. Lando*, 441 U.S. 153, 193 (1979).

The witness statements at issue are not statements of policy, expressions of opinions, recommendations, or advice concerning agency decision-making. They are, instead, statements made by percipient witnesses as to the facts they have observed relating to a given aircraft accident. Unlike the statements considered by this Court in *Reynolds v. U.S.*, 345 U.S. 1 (1952), they do not relate to classified matters or national security.<sup>4</sup> They are, thus, not the type of material that was intended to be protected by Exemption 5.

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<sup>4</sup>If the statements did relate to classified information, their release would be subject to the protection of Exemption 1 to the Act, 5 U.S.C. § 552(b)(1). Even then, however, they would not be subject to the absolute confidentiality urged here by the government, as they would have to be considered individually to determine the propriety of their classification.

(c) **Exemption 5 Does Not Incorporate the Privilege for Witness Statements Created by *Machin v. Zuckert*.**

In *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963), the court created a new civil discovery privilege for the type of witness statements at issue here. The court's opinion was based on arguments by the Air Force which are indistinguishable from those asserted in this case, that disclosure of the statements "would prejudice the efficient operation of the Department of the Air Force and . . . would be contrary to the public interest." *Id.* at 338-39.

Less than one year later, the Senate began the process that led to FOIA, finding that terms such as "requiring secrecy in the public interest" and "required for good cause to be held confidential" had been abused to withhold information "only to cover up embarrassing mistakes and irregularities". S. Rep. No. 88-219, 88th Cong., 2d Sess. (1964), reprinted at 1974 *Source Book* 91.

A review of the legislature history clearly shows that Congress rejected incorporation of the *Machin* privilege.

(i) ***Congress Did Not Intend to Incorporate All Existing Discovery Privileges Into Exemption 5.***

As this Court has noted in the past, "at best, the discovery rules can only be applied under Exemption 5 by way of rough analogies", *EPA v. Mink*, *supra*, at 86, and "it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery", *FOMC v. Merrill*, *supra*, at 354.

Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution. [*Id.* at 355.]

This caution is especially appropriate where the privilege is based on the very standard that Congress sought to eliminate by enacting FOIA, and where the legislative history shows that Congress expressly refused to amend Exemption 7 to include the privilege and subsequently declined to enact specific legislation to bring the privilege under Exemption 3.

(ii) *The Machin Privilege Is Inconsistent With the Purpose of FOIA.*

As was discussed previously, the purpose of FOIA was to prevent agencies from hiding their mistakes by eliminating such vague phrases as "requiring secrecy in the public interest" as a basis for denying the release of information. 1965 Senate Report 3; *EPA v. Mink*, *supra*, at 79; *GTE Sylvania, Inc. v. Consumers Union of the United States*, *supra*, at 385.

The *Machin* privilege is based on just that rejected standard, and has the very same effect of keeping the public from knowing the facts about mistakes that caused accidents. For this Court to accept the government's argument that Exemption 5 incorporates the *Machin* privilege, it must find that Congress intended, without saying so, to preserve a privilege based on the very standard it was expressly rejecting. Such a finding is clearly unwarranted, especially in light of the legislative history discussed subsequently.

(iii) *Congress Was Aware of the Machin Privilege When It Enacted FOIA, and Refused to Amend Exemption 7 to Protect Such Statements.*

The *Machin* privilege was brought to Congress' attention during the committee hearings before both the House and the Senate. However, contrary to the implication of the

government's brief, it was discussed in relation to Exemption 7, 5 U.S.C. § 552(b)(7), not Exemption 5. A review of the legislative history of Exemption 7 shows a clear rejection of the privilege by Congress and not, as the government argues, a desire to perpetuate the privilege.

Exemption 7, which pertains to investigatory files, had its origin in section 3(c)(7) of S1666, the 1964 Senate predecessor to FOIA. That section exempted "investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein." The Department of Justice strenuously opposed this provision, on the grounds that:

[T]he agencies have a duty to keep informed . . . to avoid official action based on inadequate information. . . .

It would seem evident that if persons interviewed by investigators are to have no assurance that what they divulge will not be published, the free flow of information necessary to the effective performance of law enforcement and *other agency functions* from . . . witnesses surely will be seriously jeopardized. [*Administrative Procedure Act: Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 212 (1964), emphasis added.]

In response to these and other comments, the subsequent legislation proposed revising Exemption 7 to provide protection for information provided in confidence, but only for "investigatory files compiled for law enforcement purposes."

This formulation was strenuously opposed before both Houses by both the Departments of Justice and Defense, with the *Machin* privilege being expressly listed as one of

the privileges for which no provision had been made.<sup>5</sup> In its written comments to both the House and the Senate, the Department of Defense stated, “. . . the exception provided in section 3(c)(7) for investigative files indicates recognition of the necessity for protecting such information, but the limitation on the protection significantly reduces its beneficial effect. There are many investigative files compiled and held by the Department of Defense for other than ‘law enforcement purposes’ which nevertheless require the same protection.” *Administrative Procedure Act: Hearings before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 417-18 (1965) (hereinafter “1965 Senate Hearings”); see, also, *Federal Public Records Law: Hearings Before the Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 220 (1965) (hereinafter “1965 House Hearings”). There followed a lengthy laundry list of the types of information the Department thought deserved protection, including the witness statements protected by the *Machin* privilege.

The Department of Justice position was set forth in both the testimony and written statement of Assistant Attorney General Schlei. Mr. Schlei stated:

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<sup>5</sup>In its brief, at pp. 28-29, the government has noted the CAB's opposition to Exemption 5, and has implied that it was based on concerns similar to those raised by the Justice and Defense Departments. However, the quoted language about “opening up ‘investigatory files’ ” in fact refers to the CAB's opposition to Exemption 7, based *solely* on the grounds that “such files contain staff views and statements.” 1965 *House Hearings* at 237; 1965 *Senate Hearings* at 367.

The CAB was thus making the objection to disclosure of documents which were mixtures of fact with matters of law or policy, which Exemption 5 was subsequently amended to cure. The CAB never expressed any concern about releasing witness statements, and as will be discussed subsequently, both the CAB and the NTSB have consistently released such statements.



The bill proposes to provide a general public information statute by revising section 3 to eliminate all application of judgment in the treatment of the important, and often difficult, matter of public information. We think the approach of the proposal, as well as its technique, is basically deficient and falls far short of accomplishing the expressed purpose of the subcommittee in this important area.

The inevitable result of this approach would be non-disclosure of many matters as to which there can be no justification for nondisclosure and disclosure of many matters which properly should be withheld. If it is to provide a workable public information statute, the proposal must abandon this approach.

[1965 *Senate Hearings* at 196.]

Mr. Schlei then presented his laundry list of alleged problems which would be created by adoption of the exemption section of the bill, including the disclosure of aircraft accident witness statements.<sup>6</sup> His written statement expanded on the Department's opposition to the entire concept of the

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<sup>6</sup>The government's brief, at p. 27, sets forth Mr. Schlei's statement that the changes he referred to "are not intended by the proponents." 1965 *Senate Hearings* at 196. Mr. Schlei's opinion of the intent of the proponents of the bill must obviously be taken with a large grain of salt. As the complete text of his comments makes clear, he was testifying in opposition to the entire concept of the exemptions. As this Court has stated repeatedly, "In construing laws we have been extremely wary of testimony before committee hearings," *S & E Contractors, Inc. v. U.S.*, 406 U.S. 1, 13 fn. 9 (1972), and "[I]t is well established that speeches by opponents of legislation are entitled to relatively little weight in determining the meaning of the Act in question," *Holtzman v. Schlesinger*, 414 U.S. 1304, 1313 fn. 13 (1973).

The legislative history also discloses that Mr. Schlei was not aware of the *Machin* decision at the time he testified and gave his statements. During the House hearings, he was asked in the course of what cannot be described as friendly questioning by Mr. Kass, to explain the *Machin* privilege to the committee. When asked, "Are you familiar with that case?", he replied, "I am sorry to say that I am not." 1965 *House Hearings* at 24.

exemptions, but made no mention of the *Machin* privilege. Instead, his comments were clearly intended to apply to every type of agency investigation:

It would seem evident that if persons interviewed by investigators are to have no assurance that what they divulge will not be published, the free flow of information necessary to the effective performance of regulatory, benefit, and other agency functions from complainants and witnesses surely will be seriously jeopardized. In many cases persons sought to be interviewed, not only concerning criminal violations or fraudulent practices in a regulated activity, but also with respect to competition, business conditions, or other matters in which no accusations are involved, will refuse to talk to agency investigators and employees as soon as they realize that all information furnished by them may be made public. [1965 Senate Hearings at 206.]

However, despite these clear and unambiguous requests from the government to widen the scope of Exemption 7 to include materials such as witness statements to aircraft accident boards, Exemption 7 as enacted by Congress remained limited to "investigatory files compiled for law enforcement purposes". In view of its express refusal to amend Exemption 7 to protect the witness statements at issue here, it seems apparent that Congress intended that they not be protected by FOIA.

- (iv) *There Is No Indication in the Legislative History That Congress Intended to Amend Exemption 5 to Include Investigatory Material Not Covered by Exemption 7.*

At the time Congress refused to amend Exemption 7 to cover statements from witnesses, it did amend Exemption 5. As was previously discussed, this amendment was made in response to concerns expressed about the disclosure of

documents containing factual material in addition to matters of law or policy. In its brief, the government argues that this amendment was also made to extend protection to confidential witness statements in non-law enforcement investigations. This argument is totally devoid of any support in the legislative history.

The only references to this material anywhere in the legislative history were in the statements of government agencies in opposition to Exemption 7. Not a single member of Congress expressed the view that such statements should be protected under either exemption, let alone under Exemption 5. Indeed, not even the government argued that Exemption 5 should include such materials.

In its opposition to the 1964 predecessor to FOIA, the Justice Department directed its comments on Exemption 5 solely to the issue of internal memoranda containing advice, proposals, analysis or recommendations. *1964 Senate Hearings* at 213. The Defense Department objected on the grounds that "almost every conceivable subject can be construed as being a matter of policy or law, so that the [exemption] . . . would have no discernable meaning." *1964 Senate Hearings* at 493.

In the 1965 committee hearings, the Defense Department's comments on Exemption 5 were limited solely to the issue of disclosure of mixed documents of fact, law and policy. *1965 Senate Hearings* at 417; *1965 House Hearings* at 220.

There is, thus, nothing in the legislative history from which it can be inferred, either implicitly or by way of analogy, that witnesses statements specifically excluded from Exemption 7 were thereafter to be included in Exemption 5.

**B. CONGRESS HAS REPEATEDLY REJECTED SIMILAR ARGUMENTS SUBSEQUENT TO ITS ENACTMENT OF FOIA.**

In addition to the legislative history of FOIA itself, there is significant legislative history concerning both the specific types of statements at issue here and similar arguments for confidentiality which reinforces the conclusion that Congress does not intend these documents to be withheld.

**1. Congress Has Twice Rejected Legislation to Create the Very Privilege at Issue Here.**

Exemption 3 to FOIA, 5 U.S.C. § 552(b)(3), provides that the Act does not apply to information exempted by statute from disclosure. The government has twice requested that Congress pass legislation specifically prohibiting the release of confidential witness statements given to military aircraft accident boards, and Congress declined both requests.

In January 1980, the Department of Defense forwarded to the House a request for legislation and draft legislation which provided, in part, that release, discovery or use in litigation of confidential witness statements given to accident investigation boards would be prohibited unless authorized by the Secretary of the military service involved. *Hearing on H.R. 6362 Before the Procurement and Military Nuclear Systems Subcomm. of the House Committee on Armed Services*, 96th Cong., 2d Sess. 1-3 (1980) (hereinafter "1980 Hearing").<sup>7</sup> Following a one-day hearing at which the only witness was Lt. Gen. Howard Lane, the Inspector General, U.S. Air Force, the committee favorably reported the bill to the House. H.R. Rep. No. 96-1445, 96th Cong., 2d Sess. 1 (1980). However, the bill was never acted on by either the House or the Senate.

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<sup>7</sup>The relevant portions of the draft legislation are set forth at Appendix A.

In April 1983, an Executive Branch legislative request for similar legislation was transmitted to the Senate. S. Conf. Rep. No. 98-213, 98th Cong., 1st Sess. 263 (1983). The proposed legislation was incorporated in the *Department of Defense Authorization Act*, 1984, S675, 98th Cong., 1st Sess. (1983) as Sec. 1009,<sup>8</sup> and was passed by the Senate, apparently without any debate. The Conference Committee deleted the provision, stating, "[T]he conferees believe that this matter requires further study," S. Conf. Rep. No. 98-213, 98th Cong., 1st Sess. 263 (1983), and requesting further data from the Department.<sup>9</sup>

This legislative history is plainly in conflict with the government's argument that Congress clearly intended these statements to be privileged. Had the "privilege" been widely accepted by Congress, we sincerely doubt that a Conference committee would return the matter for further study.

## **2. Congress Expressly Overruled the Decision in Administrator, *FAA v. Robertson*, Which Was Based on the FAA's Identical Argument.**

Congress also reacted swiftly to overrule the decision of this Court in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975), which upheld the withholding of confidential data by the Federal Aviation Administration. The FAA's justification for withholding data in that case was identical to that advanced by the government here, that information

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<sup>8</sup>The relevant portions of that section are set forth at Appendix B.

<sup>9</sup>According to information received in informal telephone conferences with members of the Senate committee staff, the provision was deleted at the request of Senator Tower, the sponsor of the legislation, after it was brought to his attention by the Texas Daily Newspaper Association. The provision had apparently been inserted by members of the Committee Staff, and passed unnoticed as the bill progressed through the Senate.

crucial to aviation safety would not be provided to the government if a promise of confidentiality could not be provided to the supplier.

The FAA's answer also explained its view of the need for confidentiality in SWAP Reports:

"The effectiveness of the in-depth analysis that is the essence of SWAP team investigation depends, to a great extent, upon the full, frank and open cooperation of the operator himself during the inspection period. His assurance by the FAA that the resulting recommendations are in the interest of safety and operational efficiency and will not be disclosed to the public are the major incentives impelling the operator to hide nothing and to grant free access to procedures, system of operation, facilities, personnel, as well as management and operational records in order to exhibit his normal course of operations to the SWAP inspectors."

[*Id.* at 259-60.]

Although that case was based on an interpretation of Exemption 3, the Congressional reaction is relevant to the issue before the Court. The Court interpreted Exemption 3 as allowing the withholding of information if a statute gave the agency the discretion to withhold information, in that case 49 U.S.C. § 1504 which then allowed withholding when the agency believed "a disclosure of such information is not required in the interest of the public."<sup>10</sup>

Congress reacted swiftly to amend Exemption 3 to allow withholding only if the statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular cri-

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<sup>10</sup>As will be subsequently discussed, Congress also subsequently amended 49 U.S.C. § 1504 to remove the Administrator's discretion to withhold this type of information.



teria for withholding or refers to particular types of matters to be withheld." The purpose of this change was expressly to overrule the *Robertson* decision, H.R. Rep. No. 94-880, 94th Cong., 2d Sess. 22-23 (1976) ("*House Report*"); H.R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 14 (1976), which "misconceive[d] the intent of Exemption 3", and to "*eliminate the gap created in the Freedom of Information Act by the Robertson case*", *House Report* at 23 (emphasis added).

The sole effect of the *Robertson* decision was to allow the discretionary withholding of information, based on an agency's belief that such withholding was "in the public interest", where a statute gave such discretion, and Congress thus perceived that discretion as creating an unintended gap in FOIA which required immediate rectification. By amending Exemption 3, Congress sent a clear message that discretionary withholding of information *without the express approval of Congress* was contrary to the intent of FOIA.

And yet, despite this message, the government here urges this Court to find that the identical "gap" has existed in the Act all along under Exemption 5, differing only in that here the government does not even have a statutory grant of discretion. Such an interpretation would in effect say that Congress engaged in a futile act when it amended Exemption 3. It would also lead to the totally illogical result that an agency would have unfettered discretion to withhold information, under Exemption 5, if Congress had not spoken on the subject at all, but would have either no discretion or only the discretion expressly granted by Congress if Congress had spoken on the subject, under Exemption 3. This result would stand Exemption 3 and FOIA on its head, and should not be adopted by this Court.



### **3. Congress Has Expressly Revoked the Authority of the FAA to Withhold Confidential Information Relating to Aviation Safety.**

In addition to amending Exemption 3 in response to *Robertson*, Congress also acted to amend 49 U.S.C. § 1504 to remove the discretionary authority pursuant to which the FAA had withheld the information there. At the time of *Robertson*, 49 U.S.C. § 1504 provided that on objection by any person, the Administrator would withhold information if, in his judgment, disclosure would "adversely affect the interests" of the objector "and is not required in the interest of the public". However, in 1978 Congress amended that section to allow withholding only "if disclosure of such information would prejudice the formulation and presentation of positions of the United States in international negotiations or adversely affect the competitive position of any air carrier in foreign air transportation". In adopting this amendment, the House specifically mentioned the FAA's practice of "making substantially more information available to the public" as required by FOIA and the Sunshine Act, which amended Exemption 3, H.R. Rep. No. 95-1211, 95th Cong., 2d Sess. 20 (1978), reinforcing its statement that all information be disclosed unless expressly limited by the Congress.

The FAA, like the military, bears a heavy responsibility for aviation safety, including the certification of aircraft, many of which are also used by the military, the certification of pilots, mechanics and air traffic controllers, the dissemination of aviation weather information, and operation of the civilian air traffic control system, all functions also conducted by the military. In addition, the FAA conducts many aircraft accident investigations in the United States pursuant to a delegation of authority by the NTSB under 49 U.S.C. § 1903(a), and is responsible for the basic fact-

finding relating to these accidents, including the obtaining of witness statements.

It was against that background that Congress amended Section 1504 to provide for disclosure.<sup>11</sup>

#### **4. Congress Has Specifically Directed Public Disclosure of Identical Information Obtained by the NTSB.**

The National Transportation Safety Board has been charged by Congress with the responsibility for investigating and determining the probable cause of major transportation accidents, including both those involving solely civilian aircraft and those involving both military and civilian aircraft. 49 U.S.C. § 1903(a), 49 U.S.C. § 1442. In discharging that responsibility, it obtains witness statements concerning accidents that it investigates. And, as was the case with the FAA, Congress has amended the NTSB's authority since the enactment of FOIA to eliminate the Board's discretion to release information.

At the time FOIA was enacted, the Board was directed to "investigate such accidents and report the facts, conditions and circumstances relating to each accident" and "make such reports public in such form and manner as may be deemed by it to be in the public interest." 49 U.S.C. 1441(a)(2) and (a)(4). However, in the Independent Safety Board Act of 1974, Pub. L. 93-633, Congress rewrote the NTSB charter and directed that "copies of any communication, document, investigation, or other report, or information received by the Board . . . shall be made available to the public," 49 U.S.C. § 1905(a), except for information

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<sup>11</sup>Of course, much information received by the FAA continues to be protected by other exemptions to FOIA, including Exemptions 4 (trade secret information obtained during aircraft certification), 6 (personal information concerning pilots, etc.), and 7 (investigations conducted for enforcement proceedings).

on trade secrets and *information subject to the FOIA exemptions.*

In its comments on the proposed legislation, the Board stated:

The provision concerning public access to information would appear to pose no serious problems since the Board has always made public its orders, reports, safety recommendations *and, of course, all the facts obtained in its accident investigations.*

*Independent Safety Board Act of 1974, Hearings before the Senate Comm. on Commerce, 93d Cong., 2d Sess. 129 (1974) (emphasis added).* In its report, the Committee stated:

This section sets up a broad standard for public availability of the information generated by the Board. In doing so, it echoes the broadest part of the Freedom of Information Act (5 U.S.C. 552) and evidences the Committee's belief that *such information should be generally available to the public, to give it the maximum life-saving effectiveness.*

S. Rep. No. 93-1192, 93d Cong., 2d Sess. 45 (1974) (emphasis added).

Congress was thus aware that the NTSB had always released information to the public, including witness statements, and stated that that disclosure was to continue, *echoing FOIA*, to maximize the benefit to safety. Once again, Congress has mandated the disclosure of witness statements concerning civilian accidents, which are identical in purpose to those the military here seeks to shroud in secrecy. It is not possible that Congress would differentiate its intent based solely on whether the accident involved a military or civilian aircraft.

## **5. Congress Has Criticized the Withholding Under FOIA of Safety-Related Information in Other Contexts.**

In addition to its failure to grant the government the secrecy it seeks through specific legislation, and its clear direction that identical information be disclosed relating to non-military accidents, the Congress has criticized at least one other agency for withholding information gathered during a safety investigation.

In 1972, the House undertook a review of the implementation of FOIA, and found that "most of the federal bureaucracy already set in its way never got the message". H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 7 (1972). Among the specific abuses detailed in the Report was the withholding of inspectors' reports of health and safety hazards under OSHA during the pendency of enforcement proceedings. *Id.* at 26-28. The Committee concluded, "This use of [Exemption 7] in such situations involving occupational safety and health, even the lives of millions of American workers, is contrary to sound public policy." *Id.* at 28. Given the weapons systems often involved in military aircraft accidents, it cannot be said that the same does not apply to the statements at issue here.

### **C. THE GOVERNMENT HAS FAILED TO MEET ITS BURDEN OF PROOF UNDER FOIA.**

The Act provides that the government bears the burden of proof of establishing that the requested information is exempt. 5 U.S.C. 552(a)(4)(B); *FOMC v. Merrill*, *supra*, at 352. Even if Exemption 5 were to protect witness statements given in confidence, the government has failed to meet its burden of showing that the statements sought by respondents were in fact given pursuant to a promise of

confidentiality. It has also failed to meet its burden of showing that the professed safety hazard of releasing the reports actually exists.

**1. There Is No Evidence That Either of the Statements Sought Was Actually Given Pursuant to a Promise of Confidentiality.**

The government requests that this Court find that the witness statements sought by petitioners are protected by Exemption 5 on the grounds that such statements were given pursuant to a promise of confidentiality. However, it has never presented any evidence to show that either of the statements sought was, in fact, given pursuant to a promise of confidentiality.

The government's position is based on the allegation that the Hoover and Dickson statements were given in response to a promise of confidentiality. The record below amply shows that no such promise can be proved to have been given.

In its motion for summary judgment, the government contended that the Accident Investigation Board's investigation of this accident had been conducted pursuant to Air Force regulation AFR 127-4, *dated October 24, 1975*, and the court so found.<sup>12</sup>

After it was noted during oral argument before the Ninth Circuit that this regulation *postdated* the accident, and the Board, by nearly two years, the court invited the government to submit a supplemental brief on that issue, *including a reference "to parts of the record, if any, indicating whether promises of confidentiality were made to the witnesses whose statements are sought"*.<sup>13</sup>

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<sup>12</sup>Finding of Fact 1, set forth at Pet. App. 22a.

<sup>13</sup>Br. in Opp. App. 1.

The government did submit a supplemental brief,<sup>14</sup> *but was unable to identify a single piece of evidence in the record to substantiate its claim that promises of confidentiality had in fact been made.* Instead, it referred for the first time to AFR 127-4, dated January 1, 1973, which it now contends is the correct regulation, and further attempted to establish a general custom and practice of such assurances being given.

The government attached a portion of AFR 127-4 dated January 1, 1973, to its petition. Pet. App. at 31a. It did not advise the court of the portions of that regulation which disclose what a witness is to be told before he gives a statement. Those portions provide *only* that:

Witnesses will be advised before they testify that the sole purpose of the investigation is to determine all factors relating to the accident/incident and in the interest of accident prevention, to preclude recurrence.<sup>15</sup>

Thus, in the regulations that the government now claims applied, there is nothing which requires, or even suggests, that a witness be promised that his testimony will be confidential.

As the government has been unable to produce a scintilla of evidence that either Hoover or Dickson was promised that his statement would be confidential, the issue presented does not arise under the facts before the Court.

The government has, thus, failed to produce any evidence that the witnesses were promised that their statements would be confidential.

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<sup>14</sup>Br. in Opp. App. 2-5.

<sup>15</sup>Br. in Opp. App. 6, para. 12(c).



**2. The Government Has Failed to Show That Release of the Witness Statements Will Have Any Negative Effects on Safety.**

The government alleges that if witness statements are found to be releasable, its sources of information will dry up. It has produced no evidence to support this amazing proposition, and all available evidence is to the contrary.

The sole support in the record for this proposition is the affidavit of Major General Russell (J.A. 37-40). As the Court of Appeals noted, this affidavit is conclusory and devoid of any supporting evidence.<sup>16</sup> *Weber Aircraft Corp. v. United States*, 668 F.2d 638, 646 fn. 12 (1982). It also does not show whether General Russell ever reviewed the statements himself. As this Court stated in *Reynolds v. U.S.*, 345 U.S. 1 (1952), when it previously considered an Air Force claim of confidentiality for witness statements like those at issue here, a claim of executive privilege "is not lightly to be invoked. There must be a formal claim . . . lodged by the head of the department . . . *after actual personal consideration by that officer*," *id.* at 7-8 (emphasis added) and "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers", *id.* at 9-10. Or, as Senator Chiles commented during the floor debate on the 1974 amendment to Exemption 1:

However, to raise the opinion of one person, especially an interested party, to that of a rebuttable

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<sup>16</sup>The affidavit does contain a reference to accident rates in 1950 and 1979, and makes a hearsay reference to an unidentified study. However, nothing is shown to tie the decrease in accident rates to the confidentiality of witness statements, and Weber would note that the years chosen are themselves suspect, as 1950 was at the height of the Korean War buildup, and at the same time as jet aircraft and helicopters were first entering service and represented untried technology; and 1979 was during peace at a time when many aircraft were grounded due to parts shortages, flying time was very limited due to fuel and budgetary constraints, and most aircraft were fully proved.



presumption is to destroy the possibility of adequate judicial oversight which is so necessary for the Freedom of Information Act to function.

We say that four-star generals or admirals will be reasonable but a Federal district judge is going to be unreasonable. I cannot buy that argument, especially when I see that general or that admiral has participated in covering up a mistake.

1975 *Source Book* 319.

In addition to this lack of evidence from the government, the experience of the government in investigating civilian aircraft accidents militates strongly against the government's position here.

As was discussed previously, both the FAA and NTSB investigate civilian aircraft accidents and obtain witness statements. Both routinely release these statements, and neither has ever argued that it needed confidentiality for these statements.<sup>17</sup> The magnificent record of these agencies in determining the causes of accidents and preventing future accidents, without the help of confidentiality, shows just how weak the government's argument actually is.<sup>18</sup>

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<sup>17</sup>In its brief, the government has cited the Aviation Safety Reporting Program as an example of the FAA's and NASA's finding of the value of confidentiality. But what the government has not told this Court is that witness statements submitted to that program are *not* given confidentiality if they relate to an *accident* or criminal activity. Those statements, with all identifying details, are forwarded to the FAA and NTSB if they relate to an accident, or to the Justice Department if they relate to criminal activity. 44 Fed. Reg. 24981, April 27, 1979. *See, also*, 41 Fed. Reg. 15903-04, April 15, 1976.

<sup>18</sup>The government argues that this Court should disregard any comparison between the military and civilian programs because of the "differences" between them. But the distinctions made by the government subsume the issue before the Court. The government argues that the NTSB charter requires the release of witness statements, whereas there is no similar mandate to the military. But that latter proposition is precisely what this Court must decide: does FOIA mandate disclosure by the military as well? Likewise, the argument that the military lacks subpoena power ignores the fact that it has told Congress it does not want that power, 1980 *House Hearings* at 23, as well as the government's own admission that it has the authority to order the testimony of members of the military, such as the witnesses whose statements are sought by respondents. Brief for Petitioner at 3, fn. 3.

The government's argument is further weakened by its assertion of confidentiality for *every* statement by *every* witness, including the vast majority of witnesses who would testify freely without confidentiality or who would be willing to have their statements released.<sup>19</sup> The scope of the privilege being sought thus goes far beyond what can even colorably be argued to be necessary.<sup>20</sup>

There is, in short, no real basis upon which this Court can find that confidentiality, as sought by the government, is in fact required.

#### D. EQUITY REQUIRES THAT THE STATEMENTS BE RELEASED.

Even if the statements were within the *Machin* privilege, and the *Machin* privilege were included within Exemption 5, the privilege under Exemption 5 should be limited to the scope of privilege which would, in fact, be available in civil litigation.

[S]ince the Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein . . . it is reasonable to construe Exemption 5 to exempt those documents, *and only those documents*, normally privileged in the civil discovery context. [*N.L.R.B. v. Sears, Roebuck & Co.*, *supra*, at 149.]

The availability of the executive privilege in civil litigation is strongly dependent on the necessity for the information. As this Court stated in *Reynolds v. U.S.*, *supra*, in

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<sup>19</sup>During the pendency of this appeal, counsel for respondents have asked a significant number of witnesses in military aircraft litigation whether they would object to the release of their statements to the accident investigation boards. They have unanimously said they had no objection.

<sup>20</sup>If the government really thinks it will have a problem with certain witnesses, we see no reason it could not seek authority from Congress for a type of limited use immunity such as exists in criminal law.

considering another request for this type of statement in the civil litigation context, "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted." *Id.* at 11. The necessity in this case plainly outweighs the government's questionable assertion of the need for confidentiality.

**1. Release of the Statements Here Will Prevent Perjury, and Further a Fundamental Goal of the Legal System: the Ascertainment of the Truth.**

As has previously been discussed, the statements which are sought by respondents are at direct variance with the sworn testimony of the witnesses in both the military legal investigation and in depositions in the underlying litigation. Thus, the statements are crucial to proving the truth as to what really happened, to allowing the jury to determine the credibility of the witnesses, and to the prevention of perjured testimony at trial. In *U.S. v. Havens*, 446 U.S. 620 (1980), this Court held that not even the Fourth Amendment provided a strong enough privilege to allow it to be "perverted into a license to use perjury," *id.* at 626, as "[t]here is no gainsaying that arriving at the truth is a fundamental goal of our legal system," *id.* at 626. The executive privilege relied on here by the government is surely no stronger a shield than the Fourth Amendment, and should also be overcome to avoid the introduction of perjured testimony.

It is also clear that there is no other source for this information, as the statements are unique. The Air Force "legal investigation", which the government argues is a sufficient source of information to civil litigants, does not contain the information in these statements, and is in fact directly contrary to the content of these statements.

Indeed, the very existence of the accident investigation board in addition to the "legal investigation" is an admis-

sion by the government that the information developed by the "legal investigation" is inadequate, as a general proposition, for the determination of what really happened in an accident.<sup>21</sup>

## **2. The Privilege Has Been Waived Both by the Government and the Witness.**

As previously noted, portions of the Hoover statement were voluntarily produced pursuant to a valid subpoena by an Air Force employee, and were reviewed by all parties present at the deposition. That release constitutes a waiver of whatever privilege the Air Force may have had under FOIA. As the Fifth Circuit stated when considering a similar release of accident board reports:

Whether it results from negligence, or from voluntary and knowing acts on the part of Navy personnel, the fact remains that the release of these reports to persons other than those authorized by Navy regulations can be traced directly to the Department of the Navy. . . . Thus, the Navy did not adhere to its own regulations pertaining to the dissemination of information contained in these [Aircraft Accident Reports] and should now be held to have waived the exemption which it might have had under the Freedom of Information Act insofar as this particular report is con-

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<sup>21</sup>In addition to the fact that the legal investigation is often completed significantly after the safety investigation, the legal investigation is typically conducted by an officer from the same base as the accident aircraft crew, who rarely has any training or experience in accident investigation (as opposed to the safety board, which always has a trained investigator as a member), and who almost never has the same access to witnesses or consultants as the safety board members (unlike the safety board members, the legal investigation officer rarely visits the accident site, the repair/overhaul facilities for the aircraft, the aircraft manufacturer(s), or any of the facilities that conduct engineering investigations relating to the accident). The report of the legal investigation is thus by its very nature far less factually complete than the safety investigation.

cerned. The Navy Department simply cannot permit these reports to be available to some people, who are not authorized under its own regulations . . . and then deny the same privilege to others.

*Cooper v. Department of the Navy*, 594 F.2d 484 (5th Cir. 1979), *cert. denied* 444 U.S. 926 (1976) (Cooper II) (quoting the trial court with approval).

#### **E. THE PUBLIC INTEREST MANDATES RELEASE OF THE WITNESS STATEMENTS.**

In addition to the public's clear interest in avoiding unnecessary costs imposed on the judicial system by groundless or unduly extensive litigation, and its interests in avoiding the costs imposed by the imposition of huge judgments on innocent defense contractors, the public has a clear safety interest in the release of military board witness statements. It is a simple fact that much of the military aircraft fleet is composed either of aircraft also in the civilian fleet or aircraft using components used in the civilian fleet. In addition, military pilots fly the same skies, through the same weather and air traffic as civilian pilots. The unnecessary withholding of witness statements thus deprives the civilian public of information that may be beneficial in preventing civilian accidents, either by way of providing examples of what can happen in given circumstances, or through the identification of potential problems with similar civilian equipment. It also prevents the public from learning of problems in the military, either in the quality of personnel, lack of parts or funding, or simple poor judgment, and hence deprives the public of input in correcting these problems. Finally, it deprives the public of the knowledge of what went wrong and resulted in the destruction of expensive and potentially catastrophically destructive weapons systems purchased with the public's money.

#### IV. CONCLUSION.

In conclusion, there is no evidence in the legislation history of the Act to support the government's position. On the contrary, the legislative history shows that Congress rejected a suggestion that Exemption 7 be amended to protect such statements, and never intended Exemption 5 to cover purely factual documents. Congress has failed to enact specific legislation to give the military the specific protection it here seeks under Exemption 3, and has clearly mandated the disclosure of similar materials obtained by the government in civilian accident investigations. And, even if this Court should hold that Congress intended Exemption 5 to incorporate the *Machin* privilege, the equities of this case and the government's failure to meet its burden of proof still mandate disclosure.

Finally, the government's argument that Exemption 5 confers authority to an agency to withhold disclosure of intra-agency memoranda where disclosure would undermine the effectiveness of the agency's policy is subject to the same infirmity as this Court found in the essentially identical argument made by the FOMC in *FOMC v. Merrill*, *supra*, at 354:

[T]he Committee's argument proves too much. Such an interpretation of Exemption 5 would appear to allow an agency to withhold any memoranda, even those that contain final opinions and statements of policy, whenever the agency concluded that disclosure would not promote the "efficiency" of its operations or otherwise would not be in the "public interest." This would leave little, if anything, to FOIA's requirement of prompt disclosure, and would run counter to Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the

basis of some vague “public interest” standard.

In view of the foregoing, respondent Weber Aircraft Corporation respectfully requests that this Court affirm the decision below.

December 8, 1983.

Respectfully submitted,

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## APPENDIX A.

### § 371. *Investigation reports: use as evidence*

(a) Under regulations prescribed by the Secretary concerned, a safety investigation and report of each accident involving an aircraft of his armed force may be made in the interest of safety to identify the factors, human and material, which have directly or indirectly contributed to the accident to determine the cause and prevent recurrence.

(b) Unless expressly authorized by the Secretary concerned, no part of a record or report of a safety investigation listed in subsection (c) shall be —

(1) released outside of the armed force concerned;

(2) subject to discovery; or

(3) used as evidence, or to obtain evidence, in any disciplinary action, suit, or other judicial or administrative proceeding arising from the accident investigated.

(c) Subsection (b) applies to —

(1) proceedings, findings, and recommendations;

(2) statements or information obtained under an express promise of confidentiality from a witness or manufacturer;

H.R. 6362, 96th Cong., 2d Sess. (1980)

## APPENDIX B.

### § 391. *Definition*

In this chapter, "safety investigation" means an investigation conducted solely to determine the cause of an aircraft accident and to obtain information which may prevent the occurrence of similar accidents.

### § 392. *Investigation reports; limitation on use*

(a) The Secretary concerned may conduct a safety investigation of any accident involving an aircraft under the jurisdiction of the Secretary.

(b) No part of any record or report of a safety investigation described in subsection (c) may —

(1) be released outside of the armed force concerned, unless expressly authorized by the Secretary concerned to be released for safety purposes;

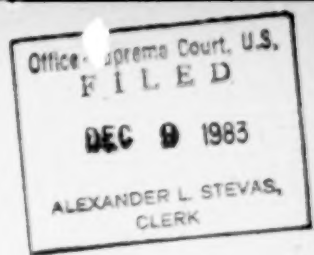
(2) be subject to discovery in any judicial or administrative proceeding; or

(3) be used as evidence, or to obtain evidence, in any disciplinary action or suit or other judicial or administrative proceeding.

(c) Subsection (b) applies to any part of a record or report of a safety investigation relating to —

(1) the deliberative portions of an investigation, including any discussion, analysis, opinion, conclusion, finding, or recommendation;

(2) statements or information obtained under an express or implied promise of confidentiality from a witness or manufacturer; or



No. 82-1616  
IN THE  
**Supreme Court of the United States**

October Term, 1983

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

WEBER AIRCRAFT CORPORATION, *et al.*,

*Respondents.*

**BRIEF FOR THE RESPONDENT**

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**Question Presented.**

Whether the United States Air Force has authority under Exemption 5 of the Freedom of Information Act (5 U.S.C. 552(b)(5)), to withhold factual witness statements made to an Air Force Safety Investigation Board?

**Parties to the Proceedings.**

The United States of America is the Petitioner. Respondents are Weber Aircraft Corporation and Mills Manufacturing Corporation.

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#### Rule

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#### Statute

United States Code, Title 5, Sec. 552(b)(5) .....	i, 3
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No. 82-1616  
IN THE  
**Supreme Court of the United States**

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October Term, 1983

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UNITED STATES OF AMERICA,

*Petitioner,*

vs.

WEBER AIRCRAFT CORPORATION, *et al.*,

*Respondents.*

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**BRIEF FOR THE RESPONDENT.**

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**Opinions Below and Jurisdiction.**

Respondent Mills concurs in the portions of Petitioner's Brief entitled "Opinions Below" and "Jurisdiction".

**Statute and Regulations Involved.**

Respondent concurs in the portion of Petitioner's Brief entitled "Statute and Regulations Involved", except that, with reference to Paragraph 3 thereof, Respondent Mills observes that Air Force Regulation 127-4 (Jan. 18, 1980), and Air Force Regulation 110-14 (July 18, 1977), were not in force in 1973, when the Air Force conducted its investigation of the accident which gave rise to this case.

**Statement.**

As mentioned in the briefs of this Respondent and Respondent Weber Aircraft Corporation in opposition to the Petition for Certiorari, there is substantial reason to believe

(i) that the true cause of Captain Hoover's injuries was error on the part of Air Force personnel in rigging, modifying, and maintaining Captain Hoover's parachute equipment; (ii) that such error has been disclosed in the factual statements made to the Air Force Safety Investigation Board which are sought in the instant case; and (iii) that such error was deliberately suppressed in the non-confidential statements to the Air Force Collateral Investigation Board which have been furnished to Respondents.

In addition to being a matter of vital importance to Respondents' defense in the underlying litigation, it must be noted that if there was *Air Force personnel error*, there is reason to believe that the error occurred because of deficient Air Force policies and procedures concerning personnel training and the assignment of personnel to tasks for which they are not adequately qualified.

Specifically, if, as we believe was the case, Captain Hoover's injuries were caused by faulty performance on the part of the Air Force rigger who last worked on Captain Hoover's parachute equipment, the proceedings before the Collateral Investigation Board together with deposition testimony in the underlying litigation, have elicited facts indicating that the rigger was a high school drop-out whose reading capabilities were below normal; that the tasks which he was assigned to perform on Captain Hoover's equipment may have required reading and other skills greater than he possessed; and that, through shortcomings in the applicable Air Force programs and procedures for training and assigning such personnel, he was passed through the pertinent Air Force training courses without having learned what he should have learned, and was then assigned to duties whose complexities exceeded his capabilities.

Considering the highly complex equipment with which Air Force personnel must routinely deal, and considering

the potentially devastating consequences if there are shortcomings in Air Force programs and procedures for training and assigning personnel to work with such equipment, the foregoing facts are clearly within a category of factual information that is of vital interest to the public at large, and to appropriate committees of Congress, the Chief Executive, the Secretary of Defense, and "watchdog" entities such as the General Accounting Office.

The question here is whether there is any support for Petitioner's assertion that Congress intended the Air Force to have such a privilege to conceal factual information when Congress enacted Exemption 5 of the Freedom of Information Act (5 U.S.C. 552(b)(5)).

In view of the foregoing, it is materially inaccurate to suggest the issue raised by Respondents in this case has no greater significance than that of an instance of private parties seeking to use the Freedom of Information Act as a substitute for civil discovery in private litigation, and that the privilege claimed by Petitioner is fully consistent with the goals of the Freedom of Information Act.

#### SUMMARY OF ARGUMENT.

Exemption 5 of the Freedom of Information Act does not exempt the material at issue here from disclosure either:

- A. As matter privileged in the context of civil discovery; or
- B. Because of the asserted promise of confidentiality; and,
- C. the exercise in judicial legislation urged by Petitioner should not be indulged, leaving for the Congress the responsibility of providing such remedial legislation as the Air Force may demonstrate it needs.

**A. As to Non-Disclosure for Reasons of Privilege in the Civil Discovery Context.<sup>1</sup>**

Petitioner is clearly incorrect in its assertions that the language of Exemption 5 of the Freedom of Information Act is plain and unambiguous. To begin with, as noted by Mr. Justice White in his opinion in *EPA v. Mink*, 410 U.S. 73, at pages 85-86, the civil discovery privileges can be used, at best, only as rough analogies in determining the content of Exemption 5. Even if the existence of a particular privilege is undisputed, its assertion in two different cases with respect to the same document may lead to disclosure of the document in one case and withholding of it in the other case, depending upon such factors as the roles occupied by the private party and the agency in the two cases, and differing equities supporting disclosure and non-disclosure. The language of Exemption 5, therefore, is demonstrably neither plain nor unambiguous.

In addition, as was also recognized by Mr. Justice White in the portion of his opinion in *Mink*, cited above, and as was illustrated more dramatically perhaps by the legislative fate of this Court's attempt to compile a definitive list of privileges as part of its submission of proposed Federal Rules of Evidence to Congress, there is a marked lack of unanimity as to what the civil discovery privileges are.

Finally, as noted by this Court in *FOMC v. Merrill*, 443 U.S. 340, at page p. 355, Congress saw fit to incorporate a number of civil discovery privileges into exemptions *other* than Exemption 5.

In view of the foregoing, it cannot be said that Exemption 5 plainly and unambiguously incorporates all civil discovery

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<sup>1</sup>Mills' response to subdivision "A". Petitioner's Brief, pages 14-24.

privileges (or even that it incorporates all such privileges which are not found in the other exemptions), unless Petitioner means to say that Congress intended Exemption 5 to be a blanket abdication of legislative power to the judiciary.

In short, Petitioner's argument that Exemption 5 plainly and unambiguously incorporates all discovery privileges, is tantamount to saying that Congress intended Exemption 5 to mean whatever the courts from time to time might say it means. This Court never has, and we feel confident, never will, adopt the construction of Exemption 5 urged by Petitioner.

The only alternative to such a construction, is to proceed as this Court did proceed, first in *Mink, supra*, and later, in more detail, in *FOMC v. Merrill, supra*; that is, to make, in each instance, a careful analysis of the legislative history to ascertain whether the claimed privilege was "specifically contemplated" by Congress (to use this Court's exact phraseology in *Merrill*), or "explicitly recognized" by Congress (to use the substantially identical phraseology of the Court below).

Contrary to Petitioner's assertions, the *Merrill* analysis clearly does *not* involve some sort of nebulous flexible approach, which Petitioner has never defined or explained beyond saying that it involves drawing "inferences" and "analogies".

Given the overriding policy of the Freedom of Information Act that information *must* be disclosed unless it falls within one of the specific exemptions in the Act (which, under settled principles, are to be narrowly construed), it follows that if the legislative history contains no clear and reliable indication that Congress intended to incorporate a given privilege into Exemption 5, and if, as here, the claimed privilege is not within any of the other exemptions, the

claimed privilege does not exist.

Correctly applying *FOMC v. Merrill*, *supra*, the Court below found the claimed privilege does not exist.

**B. Congress Did Not Specifically Contemplate That Exemption 5 of the Act Would Serve to Exempt the Material at Issue Here From Disclosure Because of the Asserted Promises of Confidentiality.<sup>2</sup>**

In its Argument, Petitioner impliedly concedes the analysis employed by this Court in *Merrill*, *supra*, was correctly described in the opinion of the Court below and has been correctly described by Respondents. Thus, Subdivision B of Petitioner's Argument seems to abandon the position taken in subdivision "A" of its brief, discussed above.

Under subdivision "B" of Petitioner's Argument, the real and fundamental issue before the Court seems to be whether statements in behalf of the Departments of Defense and Justice, constitute "legislative history."<sup>3</sup>

At least, the Defense and Justice Departments' advocacy of the privilege at the Committee hearings shows a clear understanding that enactment of the Freedom of Information Act would abolish the privilege *unless* it were incorporated in Exemption 5.

In order to transform the statements submitted by the Departments of Defense and Justice into evidence of the intent of Congress, *i.e.*, *legislative history*, Petitioner relies exclusively upon a passing remark in the Senate Commit-

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<sup>2</sup>Mills' response to subdivision "B", Petitioner's Brief, pages 25-36.

<sup>3</sup>Petitioner urges the intent of Congress is expressed in the statements of others. The statements referred to advocated the adoption of the privilege claimed here. The statements were made in hearings before a Senate committee studying proposed legislation, including among other matters, proposed wording for Exemption 5.



tee's report to the effect that the final wording of Exemption 5 "reflects suggestions made to the Committee in the course of the hearings."

Petitioner has failed to come forward with anything in any Committee report, the Congressional Record, or any other source, indicating that any Congressional Committee, or, in fact, any member of the House or Senate, ever *specifically contemplated* that Exemption 5 was to include the privilege claimed in the instant case.

Measured against *FOMC v. Merrill*, *supra*, Petitioner's reliance upon the Senate Report's statement that the final wording of Exemption 5 "reflects suggestions made to the Committee in the course of the hearings", falls far short of the mark. It fails to show any *specific* contemplation by the Committee of *anything*.

In *EPA v. Mink*, *supra* (410 U.S., at 89-91), on the other hand, this Court found that the suggestions which led to the final wording of Exemption 5 were suggestions pointing out that, under the wording originally proposed, it would have been necessary to disclose *in toto* a document consisting partly of *factual* statements (which Congress clearly intended to be disclosed) and partly of an attorney's work product or other deliberative materials (which Congress intended to be privileged).

Finally, as was cogently observed by Mr. Justice Stevens in dissent in *FOMC v. Merrill*, *supra*, if every statement or suggestion made to a Congressional Committee by interested parties were deemed evidence of the intent of Congress, the Freedom of Information Act (and, we might add, many other important acts) would soon be reduced to a shambles.

Petitioner has wholly failed to show Congress "specifically contemplated" Exemption 5 was to contain any such privilege as that claimed in the instant case, and the Court below correctly so held.

**C. The Exercise in Judicial Legislation Urged by Petitioner Should Not Be Indulged, Leaving for the Congress the Responsibility of Providing Such Remedial Legislation as the Air Force May Demonstrate It Needs.**

Petitioner is asking this Court to indulge in judicial legislation in a matter which is already under consideration by the Senate. We urge the Court refrain and leave to the Congress further resolution of the need for remedial legislation, if any.

As heretofore observed, there is no evidence whatsoever in the legislative history that Congress intended to include within the scope of Exemption 5, the privilege claimed here by Petitioner. In fact, there are substantial indications that Congress did not intend to adopt any such privilege.

*First*, the phraseology of the Act's nine exemptions would indicate that, whenever Congress intended to include a privilege for confidential statements, it did so by express language.

*Second*, significance must be given to Congress' overruling of this Court's decision in *FAA v. Robertson*, 422 U.S. 255. There Congress forcefully demonstrated its unwillingness to permit a privilege like the one claimed here to be founded upon the broad and general language formerly contained in Exemption 3 of the Act. It must, we submit, be reasonably concluded that Congress did not intend any such privilege to exist unless it were supported by clear legislative authority.

*Third*, the legislative history of Article V (Privileges) of the Federal Rules of Evidence,<sup>4</sup> shows the existence of strong disagreement among the members of Congress as to what

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<sup>4</sup>See, S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974).

the discovery privileges are, including those privileges concerning governmental secrets and official information. There is no reason to suppose that greater unanimity on this subject existed among the members of Congress when they enacted Exemption 5, than that which existed when they were unable to agree upon the enumeration of privileges submitted to them by this Court in its proposed Federal Rules of Evidence.

Furthermore, the questions raised by Petitioner's claim of privilege are sensitive policy questions with which the Congress, rather than the judiciary, should deal.

The privilege claimed by Petitioner, if it exists, would make it possible for the Air Force (and even a select group within the Air Force) to keep from the public and from the public's elected representatives in Government, a vast amount of factual information bearing directly upon such matters of vital public concern as the fitness of the Air Force to carry out its missions, and to manage and expend prudently the great sums of money with which the public has entrusted it.<sup>5</sup> The recognition of such a broad privilege, insulating the Air Force to a substantial degree from oversight by the public and by other branches of Government, would be unacceptable as it engenders and encourages military elitism.

Moreover, Petitioner's efforts to demonstrate the need for such a privilege rest basically upon the *a priori* assertions of those who advocate the privilege.

In this connection, it can be observed, *first*, that although such a privilege may make an individual more willing to talk, it does not necessarily assure the truthfulness of what he says.

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<sup>5</sup>These are subjects that are at the very heart of this case, involving as it does evidence of *Air Force Personnel Error*, failure of training procedures, and adequacy of training, materiel and procedures.

Given a privilege of confidentiality, a candid person may be encouraged to be more candid, but more importantly, a liar may be encouraged to embellish his lies.

*Second*, Petitioner has given no reason, and Respondent is aware of none, why persons engaged in military aviation should be particularly in need of such a privilege. Apparently, Congress has never considered that persons engaged in civil aviation need such a privilege, nor is there any general belief, in or out of Congress, that persons engaged in other activities that may involve serious accidents or catastrophes, need such a privilege. Surely it cannot be suggested that persons engaged in military aviation tend to be less ingenuous than persons in other walks of life.

Since no reason has been shown why those concerned with military aviation have a particular need for such a privilege, it would seem necessary to conclude in future cases, if Exemption 5 is held to include the privilege claimed in the instant case, that Exemption 5 would also authorize the suppression of *purely factual* statements given by witnesses, for example, in (i) "confidential" investigations by the National Transportation Safety Board of accidents involving vehicles sold in interstate commerce or, in civil aircraft accident investigation; (ii) "confidential" investigations by the Nuclear Regulatory Commission of episodes such as "Three Mile Island"; (iii) "confidential" investigations by the Food and Drug Administration of catastrophic events such as those caused by thalidomide; (iv) "confidential" investigations by the Environmental Protection Agency of such things as "Times Beach"; (v) "confidential" investigations by the Department of Health and Human Services of misadventures like the "swine" flu vaccination program; and (vi) "confidential" investigations by the Department of Agriculture of incidents of tainted meat in school lunch programs.

These and innumerable other privileges for the suppression of *purely factual* information not covered by any of the Act's eight other exemptions, would be the logically inevitable result of Petitioner's contention that this Court's decision in *FOMC v. Merrill*, *supra*, permits the courts to find such privileges in Exemption 5 by some sort of loose resort to "inference" and "analogy".

We are constrained to ask:

Would this proliferation of privileges be consistent with the intent of Congress?

In the record now before this Court, Petitioner has placed two affidavits, one from the Commanding General of the Air Force Inspection and Safety Center, and the other from the Judge Advocate General of the Air Force, each of which states unequivocally that the privilege claimed here and premised upon promises of confidentiality that spring from Air Force Regulations is necessary because Air Force investigators lack subpoena power. If these statements are true, and Petitioner can hardly challenge their truth, Congress could readily supply the missing subpoena power, and might well find that alternative to be more consistent with the public interest than to enact into legislation the privilege which Petitioner, in effect, is asking this Court to "enact".<sup>6</sup>

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<sup>6</sup>There is a more fundamental shortcoming in Petitioner's argument, however. The Air Force Regulations relied upon do not have the force and effect of law. Quite apart from the fact that AFR 127-4 (Pet. App.) is of post-accident vintage, and is instructive as to what Petitioner means today, it is probably not a substantive rule. While that alone may not be controlling on whether the Regulations are to be given the force and effect of law it is nevertheless an important consideration in determining that threshold issue.

See generally, *Chrysler Corp. v. Brown*, 441 U.S. 281, 99 S.Ct. 1705 (1979). As stated by Justice Rehnquist, in the *Brown* case.

"[t]he central distinction among agency regulations found in the Administrative Procedure Act (APA) is that between 'substantive rules' on the one hand and 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice'

(footnote continued on following page)

Finally, in April of this year, Petitioner asked Congress to enact into law the privilege which Petitioner is claiming in this case. So far, Congress has not acted, and the matter is now before the Senate, which has asked the Department of Defense to supply it with further information.<sup>7</sup>

In the circumstances, we submit that Petitioner's effort to persuade this Court to adopt the privilege in question, is

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on the other. [5 USC §553 (b), (d) (1976)]. A 'substantive rule' is not defined in the APA, and other authoritative sources essentially offer definitions by negative inference. [Footnote omitted]. But in *Morton v. Ruiz*, 415 US 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), we noted a characteristic inherent in the concept of a 'substantive rule.' We described a substantive rule — or a 'legislative-type rule,' *id.*, at 236, 94 S.Ct., at 1074 — as one 'affecting individual rights and obligations,' *Id.*, at 232, 94 S.Ct., at 1073. This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law,' *Id.*, at 235, 236, 94 S.Ct., at 1074.

That an agency regulation is 'substantive,' however, does not by itself give it the 'force and effect of law.' . . . As this Court noted in *Batterton v. Francis*, 432 US 416, 426 n. 9, 97 S.Ct. 2399, 2405 n. 9, 53 L.Ed.2d 448 (1977):

'Legislative, or substantive, regulations are "issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission. . . . Such rules have the force and effect of law.' . . .

Likewise the promulgation of these regulations must conform with any procedural requirements imposed by Congress. *Morton v. Ruiz*, 415 US at 199, 232, 94 S.Ct., at 1073 (1974). For agency discretion is not only limited by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.' *NLRB v. Wyman-Gordon Co.*, 394 US 759, 764, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969). The pertinent procedural limitations in this case are those found in the APA."

The Air Force Regulations here are only "housekeeping" or "policy" rules of agency operation, and cannot therefore be fairly relied upon as authority having the "force and effect of law."

<sup>7</sup>See, S. Conf. Rep. No. 98-213, 98th Cong., 1st Sess. 264 (1983). This most recent legislative request casts further doubt upon the Government's assertion that there is presently a viable statutory basis for the claimed privilege in the language of Exemption 5 (Pages 30-33, this brief).

clearly an effort to persuade the judiciary to engage in legislative functions which should be neither countenanced nor indulged.



## ARGUMENT.

**A. Unfortunately, the Language of Exemption 5 Has No Plain and Unambiguous Meaning. It Must Be Construed to Include Only Those Privileges for Which There Is Clear and Reliable Support in the Legislative History.**

Petitioner is, we submit, incorrect in its contention that the language of Exemption 5 is plain and unambiguous. This was clearly pointed out by Mr. Justice White, writing for the Court in *EPA v. Mink*, 410 U.S. 73, at pages 85-86, as follows:

"This language [Exemption 5] clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency. *Drawing such a line between what may be withheld and what must be disclosed is not without difficulties. In many important respects, the rules governing discovery in such litigation have remained uncertain from the very beginnings of the republic.* Moreover, at best, the discovery rules can only be applied under Exemption 5 *by way of rough analogies.* For example, we do not know whether the government is to be treated as though it were a prosecutor, a civil plaintiff, or a defendant. Nor does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." (Emphasis added.)

Mr. Justice White, then, pointed out two major sources of ambiguity in the language of Exemption 5. The first arises even in a case in which the existence of a given privilege is conceded. Notwithstanding the existence of a given privilege, its assertion in two different cases with respect to the same document may lead to disclosure of the document in

one case and withholding of it in the other case, depending upon such factors as the roles occupied by the private party and the agency in the two cases, and differing equities in the two cases supporting disclosure and non-disclosure.

That being the case there is a substantial element of ambiguity in the test prescribed by Exemption 5; namely, that the document "not be available by law to a party other than an agency in litigation with the agency". Given the same document and the same privilege, the most that can be said is that in some cases, the document would be available to the private party, and in other cases, it would not be available to him, depending solely upon factors which are completely extraneous to the Freedom of Information Act.

The second important ambiguity noted by Mr. Justice White is described in the hereinabove quoted passage that reads:

"In many important respects, the rules governing discovery in such litigation *have remained uncertain from the very beginnings of the republic.*" (Emphasis added.)

The validity of Mr. Justice White's observation was dramatically illustrated and underscored by the legislative fate of this Court's attempt to compile a definitive list of privileges in Article V (Privileges) of the proposed Federal Rules of Evidence. The Congressional treatment accorded that list of privileges is described in S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974) (reprinted in U.S. Code Cong. and Admin. News, 93d Cong., 2d Sess. (1974), Vol. 4, at pp. 7052-7053), as follows:

*"Note on Privilege"*

"Clearly, the most far-reaching House change in the rules as promulgated, was the elimination of the Court's proposed rules on privilege contained in Article V. Article V purported to define the privileges to be recognized in the federal courts in all actions, cases, and

proceedings; any alleged privilege not enumerated in Article V (e.g., that of a news reporter) was deemed not to exist and could not be given effect unless of constitutional dimension. The privileges recognized included trade secrets, lawyer-client, husband-wife, doctor-patient (but applicable only to psychotherapists), identity of informer, secrets of state, and official information.

From the outset, it was clear that the content of the proposed privilege provisions was extremely controversial. Critics attacked, and proponents defended, the secrets of state and official information privileges with the nub of the disagreement being whether the rule defining them was merely codifying existing law.

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Since it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and since the inability to agree threatened to forestall or prevent passage of an entire rules package, the determination was made that the specific privilege rules proposed by the Court should be eliminated and a single rule (Rule 501) substituted, leaving the law in its current condition to be developed by the courts of the United States utilizing the principles of the common law. \* \* \* \*

Thus, as finally adopted, Article V (Privileges) consists of a single general rule, Rule 501, which reads in pertinent part, as follows:

"Except as otherwise required by the Constitution of the United States or provided by act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . ."

Finally, as noted by this Court in *FOMC v. Merrill*, 443 U.S. 340, at 355:

“Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5 and dealt with other civil discovery privileges in Exemptions other than Exemption 5, a claim that a privilege other than executive privilege, or the attorney privilege, is covered by Exemption 5 must be viewed with caution.”

In view of the foregoing, it cannot be fairly said that Exemption 5 plainly and unambiguously incorporates *all* civil discovery privileges (or even that it incorporates all such privileges which are not found in the other exemptions), unless Petitioner means to have the Court conclude Congress intended Exemption 5 to be a blanket abdication of legislative power to the judiciary.

In short, Petitioner’s argument<sup>8</sup> that Exemption 5 plainly and unambiguously incorporates all discovery privileges, is tantamount to saying that Congress intended Exemption 5 to mean whatever the Courts from time to time might say it means. Petitioner asks the Court conclude that Exemption 5 is to have the same meaning as Rule 501 of the Federal Rules of Evidence, as applied to questions of admissibility, from time to time, in litigation between a government agency and a party other than an agency.

While such a broad grant of discretion to the judiciary is not inappropriate in the Federal Rules of Evidence, we submit that, as applied to the Freedom of Information Act, it amounts to a grant of legislative power to the judiciary which Congress never intended. And, we submit this Court did not so rule in *Merrill*, *supra*.

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<sup>8</sup>Petitioner’s Brief, pages 14-24.

The only alternative to that construction is to proceed as this Court did in *Mink*, and later with greater specificity in *Merrill*. In both cases, a careful analysis was made of the legislative history to ascertain whether the claimed privilege was "specifically contemplated" by Congress (to use this Court's precise phraseology in *Merrill*), or "explicitly recognized" by Congress (to use the substantially identical phraseology of the Court below).<sup>9</sup>

Petitioner persists, however, in its contention that the analysis made by this Court in *Merrill* involved some sort of nebulous flexible approach, which is not defined or explained beyond saying that it involved drawing "inferences" and "analogies".

In our brief in opposition to the Petition for Certiorari, we pointed out the Court in *Merrill* did no such thing. Rather, the decision in *Merrill* was clearly based upon a careful search of the legislative history of Exemption 5. The search revealed such clear and specific evidences of the intent of Congress that the inferences and analogies recognized by the Court were logically inescapable. Indeed, we believe the Court found an analogy so compelling it left no doubt as to the intent of Congress.<sup>10</sup>

Given the overriding policy of the Freedom of Information Act that information *must* be disclosed unless it falls within one of the specific exemptions in the Act (which under settled principles are to be narrowly construed), it follows that if the legislative history contains no clear and reliable indication that Congress intended to incorporate a

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<sup>9</sup>We note it is significant that Petitioner has now apparently abandoned the semantic quibble as to the alleged difference between the meaning of "specifically contemplated" and "explicitly recognized", advanced in its Petition for Certiorari. See, Petition, page 13, and Brief of Respondent Mills in Opposition, pages 6-7.

<sup>10</sup>See, 443 U.S. 340, *supra*, at 352, and, the discussion at 361-362.

given privilege into Exemption 5, and if, as in the instant case, the claimed privilege is not within any of the other exemptions, the claimed privilege does not exist.

Petitioner has wholly failed to point to any clear indications that Congress, in Exemption 5, intended to adopt the privilege which Petitioner is claiming here and we submit that there are no such indications in the legislative history. We believe the Court below correctly so held, and therefore correctly held the material sought here is not covered by any privilege and is not exempt from disclosure.

**B. The Court Below Correctly Applied This Court's Decision in *Merrill*. Congress Did Not Intend to Adopt the Privilege Claimed by the Air Force.**

Petitioner seems to agree this Court in *Merrill* made a careful search of the legislative history to ascertain whether a particular claimed privilege had been specifically contemplated by Congress.<sup>11</sup> This comports with our understanding, and the understanding of the Court below, as to what *Merrill* stands for, and it seems therefore to be an abandonment of the contentions made by Petitioner both in subdivision "A" of its Argument (and also in its Petition), to the effect that this Court's approach in *Merrill* was some sort of undefined "flexible" approach based on inference and analogy.

In any event, in subdivision "B" of its Argument, Petitioner contends that it has found evidence in the legislative history of Exemption 5, that Congress intended to adopt the privilege claimed by Petitioner here.

Petitioner suggests the evidence of that legislative history is in statements made in behalf of the Departments of Defense and Justice that advocate adoption of that privilege during hearings before a Senate committee studying pro-

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<sup>11</sup>Subdivision "B" of its Argument, Petitioner's Brief, pages 25-36.



posed wording for Exemption 5. We now proceed to examine that position.

Whatever else can be said of these statements as "legislative history", they at least show the Defense and Justice Departments clearly understood that enactment of the Freedom of Information Act would abolish the claimed privilege unless it were incorporated into Exemption 5, or, some other exemption.

In order to transform these statements into evidence of the intent of Congress, Petitioner relies exclusively upon a passing remark in the Senate committee's report to the effect that the final wording of Exemption 5 "reflects suggestions made to the Committee in the course of the hearings".<sup>12</sup>

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<sup>12</sup>The argument appears in Petitioner's Brief at page 26. The quoted material appears in S. Rep. No. 813, 89th Cong., 1st Sess. 4 (1965). At that juncture the report only recapitulates the history of the legislation. Specific comments on the amendments are made elsewhere in the report. The discussion of Exemption 5 appears at 9, as follows:

"Exemption No. 5 relates to 'inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency.' It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.' The committee is convinced of the merits of this general proposition, but it has attempted to *delimit the exception* as narrowly as consistent with efficient Government operation."

Furthermore, the suggestions offered by the Departments of Defense and Justice, that the legislation should include a privilege of confidentiality for witness statements in aircraft accident investigations was addressed to Exemption 7 of the Act (dealing with law enforcement investigations), rather than Exemption 5. *Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 89th Cong., 1st Sess., on S. 1160, and other bills (May 12, 13, 14 and 21, 1965) ("1965 Senate Hearings")*, at pages 206, 417-418; *Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 89th Cong., 1st Sess., on H. R. 5012, and other bills (March 30, 31, April 1, 2, and 5, 1965) ("1965 House Hearings")*, at page 220. Even a casual reading of Exemption 7 and its related legislative history shows conclusively that there is nothing in Exemption 7 which remotely reflects the adoption of these suggestions. *S. Rep. 813, 89th Cong., 1st Sess. (1965)*, at p. 9; *H.R. Rep. No. 1497, 89th Cong., 1st Sess. (1966)*, as reprinted in *U.S. Code Cong. and Adm. News*, at page 2428. Petitioner has never contended otherwise.



Petitioner has utterly failed to cite anything in any Committee Report, the Congressional Record, or any other source, indicating any *Congressional committee*, or, in fact, any *member of the House or Senate*, ever specifically contemplated that Exemption 5 was to include the privilege here claimed by Petitioner. Petitioner has therefore wholly failed to meet the test established in *Merrill*.

Measured against *Merrill*, Petitioner's exclusive reliance upon the Senate Report's statement that the final wording of Exemption 5 "reflects suggestions made to the Committee in the course of the hearings", falls far short of the mark. That statement fails to show any specific contemplation by the Committee or a member of the Congress of anything specific.

In *EPA v. Mink*, *supra* (410 U.S., at pp. 89-91), this Court found the suggestions which led to the final wording of Exemption 5, were suggestions pointing out that, under the wording originally proposed for that Exemption, it would have been necessary to disclose *in toto*, a document consisting partly of *factual* statements (which Congress clearly intended to be disclosed) and partly of an attorney's work product or other deliberative materials (which Congress intended to be privileged).

In this connection, the Court, at 410 U.S. 89-91, said:

"When the bill that ultimately became the Freedom of Information Act, § 1160, was introduced in the 89th Congress, it contained an exemption that excluded:

'Inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy.'

This formulation was designed to permit [a]ll factual material in government records . . . to be made available to the public. S. Rep. 1219, 88th Cong. 2d Sess., 7 (1964). [Emphasis as in Court's opinion.] The formulation was severely criticized, however, on the ground that it would permit compelled disclosure of an

otherwise private document simply because the document did not deal 'solely' with legal or policy matters. Documents dealing with mixed questions of fact, law, and policy would inevitably under the proposed exemption, become available to the public.<sup>18</sup> As a result of this criticism, Exemption 5 was changed to substantially its present form."

In Note 18 to the foregoing text, the Court gave the following examples of the statements made to the Committee (which in fact, were responsible for the final language of Exemption 5):

"Examples of these many statements are:

Federal Aviation Administration (1965 Senate Hearings, p. 446):

'Few records would be entirely devoid of factual data, thus leaving papers on law and policy relatively unprotected. Staff working papers and reports prepared for use within an agency of the executive branch would not be protected by the proposed exemptions.'

Department of Commerce (1965 Senate Hearings, p. 406):

'Under this provision, internal memorandums dealing with *mixed questions of fact, law, and policy*, could well become public information.' (Emphasis in original.)"

The foregoing passage from this Court's opinion in *Mink, supra*, and the quoted portion of Note 18 show clearly the "suggestions made to the Committee in the course of the hearings", which were reflected in the final wording of Exemption 5, were entirely different from the statements submitted by the Department of Defense and the Department of Justice. But, the so-called "evidence" of the intent of Congress to adopt the privilege claimed here consists of the Department of Defense and Justice Department statements tied to the casual reference in the Senate Committee report

that the final language "reflects suggestions made to the Committee in the course of the hearings". It is also significant that Note 16 on page 17 of Petitioner's Brief, is grossly in error when it attributes to the Court below the explanation of the final wording of Exemption 5 given by this Court in the above-quoted passage from *Mink*, and refers to that explanation as "unconvincing".

In the course of his dissenting opinion in *FOMC v. Merrill, supra*, at 443 U.S. 366, n.2, Mr. Justice Stevens offered the following cautionary remarks concerning review of the legislative history to ascertain the content of Exemption 5:

"The court admirably recognizes the danger of allowing every conceivable discovery privilege to be read into Exemption 5. See ante, at 354-355. it proposes, therefore, that only those privileges that are recognized in the legislative history of FOIA should be incorporated in the exemption. To the extent, however, that every reference in the subcommittee hearings to the danger of disclosing of some type of governmental information suffices under this test — virtually every agency appeared before Congress with a list of such 'dangers' — the exemption would render the Act meaningless." (Emphasis in original text.)

In *Merrill*, the Court's analysis fully satisfied those cautionary remarks, because the Court found very clear evidence in the legislative history that Congress had intended to adopt a limited privilege for internally generated information of a commercial nature, which, if disclosed prematurely, might frustrate the Government's ability to achieve legitimate ends which it wished to achieve through the execution and performance of contractual arrangements. The Court alluded to the "buy" and "sell" orders for government securities involved in that case and *in addition* found evidence in the records of the pertinent committee hearings

that various agencies had requested such a privilege.

By contrast, Petitioner has here been able to point only to evidence of requests, and has utterly failed to point to any evidence that Congress *specifically contemplated* the requests were to be included in Exemption 5. In the instant case, therefore, the cautionary remarks of Mr. Justice Stevens are singularly apposite.

In short, Petitioner has wholly failed to show that Congress specifically contemplated Exemption 5 was to contain any such privilege and the Court below correctly so held.

**C. Petitioner Is Asking the Court to Legislate in an Area Where the Congress Has Refused. And, Only Legislation Is Appropriate.**

The overall thrust of Petitioner's Argument asks this Court to indulge in judicial legislation in a matter which is presently under consideration by appropriate committees of the House and Senate. We urge the Court to refuse and affirm the Court below. There are substantial indications that Congress did not intend to adopt the privilege claimed here.

First, the phraseology of the nine exemptions to the Act indicates that, whenever Congress intended to include a privilege for confidential statements, it did so by express language. For example, in Exemption 4, Congress explicitly created a privilege for trade secrets and other confidential commercial and financial information submitted to the Government by persons outside government. In Exemption 7, Congress specifically recognized an exemption for "confidential information furnished only by [a] confidential source in the course of a criminal investigation or a lawful national security intelligence investigation". In addition, the scope of Exemption 1 would clearly accord privileged status to confidential information pertaining to the national defense or foreign policy which was authorized under criteria es-

tablished by an Executive order to be kept secret, and which had been classified pursuant to Executive order. Likewise, in Exemption 3, *Congress reserved to itself* the right to authorize further privileges for confidential information by statute leaving no discretion on the issue of disclosure, or establishing particular criteria for withholding information, or referring to particular types of matters to be withheld.

It is clear therefore that if Congress had intended to adopt an additional privilege of confidentiality, such as Petitioner is claiming, applicable to information which does not come within any of the privileges mentioned above, Congress would have used express language to create that privilege.

*Second*, we believe the legislative fate of this Court's decision in *FAA v. Robertson*, 422 U.S. 255, bears upon the legislative intent. In *Robertson*, this Court found a privilege for statements given by airline company personnel to the Federal Aviation Administrator. There, civilian aviation safety was the subject matter addressed. The rationale by which the Administrator and this Court justified the privilege was substantially the same as the rationale advanced by Petitioner in the instant case in support of its claimed privilege for statements pertaining to military aviation safety. See, 422 U.S. at pages 266, 267. The particular Freedom of Information Act Exemption relied upon in that case, however, was Exemption 3, *as it was then written and not Exemption 5*. At that time, the wording of Exemption 3 simply authorized withholding of information pursuant to a statute, and did not contain the requirements of Exemption 3 as it is presently written, *i.e.*, that the statute leave no discretion on the issue of withholding information, or that the statute establish particular criteria for withholding information, or refer to particular types of information to be withheld.

The *Congressional response* to that decision was to re-write Exemption 3 in the form in which it *now* exists. The legislative history explaining the Amendment states the intent of Congress was to overrule *Federal Aviation Administration v. Robertson*, *supra*, 1976 U.S. Code Cong. and Adm. News, pages 2260-2261.

We submit, the foregoing history of *FAA v. Robertson*, *supra*, shows clearly the unwillingness of Congress to permit a privilege like the one claimed here to be based upon broad and general language such as that formerly contained in Exemption 3, and presently contained in Exemption 5. The only logical conclusion to be drawn is that Congress did not intend any such privilege to exist.

*Third*, the legislative history of Article V (Privileges) of the Federal Rules of Evidence, to which we have already referred, shows the existence of strong disagreement between the members of Congress as to what the discovery privileges are, including those privileges concerning governmental secrets and official information. The lack of Congressional unanimity on that subject is clearly shown by the following passage from the legislative history on the Federal Rules of Evidence, quoted at greater length on pages 15-16 of this brief, *supra*:

"From the outset, it was clear that the content of the proposed privilege provisions was extremely controversial. Critics attacked, and proponents defended, the secrets of state and official information privileges, with the nub of the disagreement being whether the rules defining them was merely codifying existing law." (S. Rep. No. 93-1277, 93d Cong., 1st Sess. (19...), U.S. Code Cong. and Adm. News, 93d Cong., 2d Sess., 1974, Vol. 4, at pp. 7052-7053.)

Petitioner has not come forward with any reason to suppose, and we are aware of none, that greater unanimity on



this subject existed among the members of Congress when they enacted Exemption 5, than that which existed among them when they were unable to agree upon the enumeration of privileges submitted to them by this Court in its proposed Federal Rules of Evidence.

From all of the foregoing, we believe the following conclusions must be drawn:

(1) *First*, there is no evidence in the legislative history that Congress ever *specifically contemplated* the adoption of the privilege which Petitioner is asking this Court to recognize;

(2) *Second*, if Congress had specifically contemplated the adoption of that privilege, it would have used explicit language to that effect, as it did in other instances when it intended to recognize a privilege for confidential statements;

(3) *Third*, the available evidence indicates Congress is opposed to claims of privilege for confidential statements based upon broad and general statutory language, such as that of Exemption 5, and did not intend such privileges to exist unless they were supported by clear legislative authority; and

(4) *Finally*, there is no reason to suppose that there was ever sufficient agreement among the members of the Congress favoring recognition of the privilege which Petitioner wishes this Court to recognize, and, in fact, the available evidence indicates a substantial lack of unanimity among the members of the Congress on that subject.

In view of the foregoing, we believe the arguments advanced by Petitioner in this case must be regarded as a bold effort to induce this Court to indulge in judicial legislation.

Furthermore, the questions raised by Petitioner's claim of privilege are sensitive policy questions with which the



Congress, rather than the judiciary, should deal.<sup>13</sup>

We submit the recognition of such a broad privilege, insulating the Air Force to such a substantial degree from Congressional oversight was certainly never intended by the Congress.

Moreover, we would note that Petitioner's efforts to demonstrate the need for such a privilege rest basically upon the *a priori* assertions of those who advocate the privilege. To do so may encourage disclosure and when given a privilege of confidentiality although a candid person may be encouraged to be more candid, it is equally likely that a liar may be encouraged to embellish his lies to suit his private purposes.

Furthermore Petitioner has given no reason, and we are aware of none, why persons engaged in military aviation safety should be regarded differently than others who are similarly involved.

Given the breadth and complexity of governmental activities, there are many agencies which are officially concerned with safety in some important way. An important part of their official functions is to conduct investigations

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<sup>13</sup>In this connection, we believe it is most important to realize that the privilege claimed by Petitioner would make it possible for a select group within the Air Force to keep from the public and from the Congress a vast amount of *purely factual* information (not subject to Exemptions 1 through 4, or Exemptions 6 through 9 of the Act), bearing directly upon such matters of vital public concern as the fitness of the Air Force to carry out its missions, and to manage and expend prudently the great sums of money with which the public has entrusted it.

In this connection too, the wording of the "WITNESS STATEMENT FOREMAT", appearing on page 8a of the Appendix to Petitioner's Brief, and the wording of Paragraph 19a.(1), of Air Force Regulation 127-4 (January 1, 1973), appearing in Appendix E, page 31a, of the Petition for Certiorari, show explicitly that the claimed privilege, if it exists, is a privilege to keep information "only within the USAF", and to give binding assurance to those furnishing information that the information they furnish "will not be disseminated outside the US Air Force . . . ."

of serious accidents and, indeed, major catastrophes, with a view to preventing recurrence. Witnesses would be unwilling to talk frankly with those investigators too for fear of incurring personal liability, adverse publicity, reprisals from fellow workers or superiors, or other adverse consequences.

Surely it cannot be suggested that persons engaged in military aviation tend to be less ingenuous than persons in other walks of life. No reason appears, therefore, why the numerous other governmental agencies which are importantly concerned with safety investigations, could not seek to make a plausible claim of need for a privilege of confidentiality like that put forth by the Air Force. It is noteworthy, however, that Congress has never considered that there is a need for such a privilege among those numerous other governmental agencies.

If Exemption 5 is held to include the privilege claimed here, then it would also authorize the suppression elsewhere of *purely factual* statements given by witnesses, for example, in "confidential" investigations: (i) by the National Transportation Safety Board of accidents involving vehicles sold in interstate commerce; (ii) by the Nuclear Regulatory Commission of episodes such as "Three Mile Island"; (iii) by the Food and Drug Administration of catastrophic events such as those caused by thalidomide; (iv) by the Environmental Protection Agency of such things as "Times Beach" and "Love Canal"; (v) by the Department of Health and Human Services of misadventures like the "swine" flu vaccination program; and (vi) by the Department of Agriculture of incidents of tainted meat in school lunch programs. Thus, there is no apparent reason why the Air Force's *a priori* justifications for its alleged privilege would not be equally persuasive as applied to any of the foregoing "privileges."

These and innumerable other privileges for the suppression of information (not covered by any of the Act's eight other exemptions), would be the logically inevitable result should this Court reverse the Court below.

Petitioner's suggestion that *Merrill* permits some loose resort to "inference" and "analogy," and that the "inferences" and "analogies" can be based upon something as flimsy as the passing remark in the Senate Committee Report that the final wording of Exemption 5, "Reflects suggestions made to the Committee in the course of the hearings," would cause a proliferation of privileges clearly inapposite with the intent of Congress.

**D. The Congress Is Presently Considering Remedial Legislation.**

In the record now before this Court, Petitioner has placed two affidavits, one from the Commanding General of the Air Force Inspection and Safety Center, and the other from the Judge Advocate General of the Air Force, each of which states unequivocally that the privilege claimed in the instant case is necessary because Air Force investigators lack subpoena power. In this connection, the Affidavit submitted by the Commanding General of the Air Force Inspection and Safety Center (Jt. App. 37, at p. 39) states as follows:

"Open and candid testimony is received because witnesses are promised that for the particular investigation their testimony will be used solely for the purpose of flight safety and will not be disclosed outside the Air Force. *Lacking authority to subpoena witnesses*, accident investigators must rely on such assurances in order to obtain full and frank discussion concerning all the circumstances surrounding an accident." (Emphasis added.)

To the same effect, the affidavit submitted by the Judge Advocate General of the Air Force (Jt. App. 41, at p. 43)

states as follows:

"The investigating officers and boards *have no subpoena powers to compel testimony and, therefore*, promise witnesses that their testimony will be used solely for the purpose of flight safety and that it will not be released to persons outside of the Air Force." (Emphasis added.)

If these statements are true, and Petitioner can hardly challenge their truth, Congress could readily supply the missing subpoena power. We submit that Congress well might find the alternative of subpoena power to be more consistent with the public interests than to permit the Air Force to have a privilege of confidentiality, which, as noted earlier in this brief, and as explicitly asserted in the portions of the Affidavits of the two senior Air Force officers quoted above, is claimed to give the Air Force a right not only to conceal vitally important *factual* information from the public, but also to conceal it from all branches and agencies of the Government "outside of the Air Force".

The very matter which Petitioner is asking this Court to decide, is now before the House and Senate Armed Services Committees for consideration. During the Administration of President Carter, the Department of Defense requested legislation for the purpose of enacting into law the privilege claimed by Petitioner in this case. The proposed legislation was the subject of a hearing on February 7, 1980, before the Procurement and Nuclear Systems Subcommittee of the House Committee on Armed Services. (Hearing on *H.R. 6362 [H.R. 7552]*, *H.A.S.C. No. 96-43*.) At that hearing, Lieutenant General Howard M. Lane, Inspector General of the Air Force, was the spokesman for the Defense Department and the Carter Administration. (*Id.*, at p. 3.)

The proposed legislation was never enacted, although the House Armed Services Committee reported favorably on it,

after having received assurances from General Lane that the legislation, if enacted, would not totally exclude the Congress from access to confidential statements and other data included in aircraft safety investigations. (House Armed Services Committee No. 96-43 (1980), at pp. 25 and 29.) In this connection, the proposed legislation would have differed significantly from the privilege asserted by Petitioner in the instant case, in that, as we have already noted, the privilege which Petitioner is asserting before this Court would exclude the Congress and all other persons and agencies outside of the Air Force.

It is highly significant that, in connection with this 1980 legislative request and the report of the House Armed Services Committee thereon, both General Lane, as spokesman for the Department of Defense and the Administration, and the Committee, itself, were unequivocally of the view that *there was no existing statutory support whatever for the privilege of confidentiality.*

General Lane's statement to this effect, House Armed Services Committee No. 96-43 (1980), at page 27, is as follows:

"There are statutory precedents which protect the reports of the NTSB relating to railroad and civil aircraft accidents from being admitted as evidence in any lawsuit for damages growing out of any matter mentioned in such reports. The protection for railroad accident reports is found at 45 U.S.C. 41 and for civil aircraft accident reports at 49 U.S.C. 1441(e). However, these statutes do not protect these reports from being released to the public. *There presently is no statutory protection of any kind for military aircraft accident safety reports.*" (Emphasis added.)

The views of the Committee (proper "legislative history"), concurring in the views expressed by General Lane, were

as follows (H. Rep. 96-1445, 96th Cong., 2d Sess. (1980), at pp. 3-4):

*"No present statutory protection for safety reports*

The confidential and privileged status of aircraft accident safety reports, and the promise of confidentiality to persons who give information to investigators, are crucial to the continued success of aircraft safety programs within the Armed Forces. *Yet, there is no existing statutory protection of any kind for military aircraft accident safety reports.* The limited use and confidential status of safety reports are protected only by the claim of executive privilege based on the constitutional principle of separation of powers. The claim of executive privilege has been used to protect safety reports from use in litigation against the government and government contractors and from requests under the Freedom of Information Act (5 U.S.C. 552). On the other hand, safety reports are withheld from military courts-martial and other disciplinary proceedings, administrative boards, armed forces legal representatives, and United States attorneys.

The claim of executive privilege has not been universally recognized by Federal courts; and in an increasingly litigious society, the committee agrees with the position of the Executive Branch that *the status of aircraft accident safety reports should not be supported by such a slender reed.* To do so merely invites litigation at public expense while eroding the effectiveness of flight safety programs. The bill, H.R. 7552, is designed to clarify the authority of the Armed Forces to conduct aircraft safety investigations. Enactment of the bill would leave no doubt that the intent of the Congress is to promote flight safety by confining the release or use of records or reports of safety investigations to safety purposes." (Emphasis added.)

*It seems hardly necessary to point out the foregoing views are diametrically opposed to Petitioner's confident assertions that the privilege in question is clearly included within the "plain and unambiguous" language of Exemption 5, and is clearly evidenced by "legislative history" dating back to 1965.*<sup>14</sup>

In response to an Executive Branch legislative request transmitted to Congress on April 27, 1983, a provision (Section 1009) was inserted in the Senate version (S. 675, 98th Cong., 1st Sess.) of the Department of Defense Authorization Act of 1984, which would have enacted into law the privilege claimed by Petitioner in this case. No such provision, however, was included in the companion House bill (H.R. 2969, 98th Cong., 1st Sess.).

This 1983 request was first considered by the Senate Armed Services Committee, which recommended its adoption for the reason that, "Enactment of this Committee recommendation will result in a clear statement by the Congress that the issue of the confidentiality of these portions of these reports should be removed from the arena in which *individual judicial assessments are made as to the validity of this policy.*" (emphasis added) (S. Rep. 98-174, 98th Cong., 1st Sess. (1983), at p. 249.) The Committee went on to observe that the proposed legislation, if enacted, would be effective as an exemptive statute under the provisions of Exemption 3 of the Freedom of Information Act. (*Id.* at pp. 249-250.)

Because the companion House bill did not include any such privilege, and because of other differences between the Senate and House bills, the matter went to conference. At conference, the Senate agreed to withdraw Section 1009,

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<sup>14</sup>(See, e.g., Petitioner's Brief, at pp. 26-28.)



and the privilege contained therein.

The reasons why the Senate receded on this point are set forth in the Senate Conference Report (S. Rep. No. 98-213, 98th Cong., 1st Sess. at p. 264) as follows:

"Although the conferees generally agree that some legislation may be needed on this subject, the conferees believe that this matter requires further study. Therefore, the Senate recedes.

To permit the required further study, *the Secretary of Defense is requested to furnish before January 15, 1984, to the Committees on Armed Services of the Senate and House of Representatives, a report summarizing the existing practice in the military departments concerning release of information in aircraft accident safety investigation reports, the history of the development of that practice, a description of the types of information concerning aircraft accidents that are now and should continue to be releaseable to the public, and his views regarding the scope of the provisions in the Senate bill and whether those provisions would merely continue or expand existing regulatory restrictions on the release of the type of information in question.*" (emphasis added)

The foregoing circumstances clearly show that Petitioner is asking this Court not only to indulge in judicial legislation, but also to "legislate" in a matter now before the appropriate Committees of Congress for further study.

As was correctly observed in this connection by the Court below (Petition, App. A, at p. 18a; 688 F.2d 638, at p. 646):

"Congress has given continued attention to the FOIA, amending it to conform to the legislative will; judicial amendments are both unnecessary and inappropriate."

### Summary.

There is no evidence that Congress ever specifically contemplated Exemption 5 of the Freedom of Information Act should include a privilege which would justify withholding from Respondents the materials and information they seek in this case. In holding Respondents were entitled to those statements, the Court below correctly applied the decision of this Court in *FOMC v. Merrill*, *supra*.

The Court below correctly recognized Petitioner is attempting to persuade the judiciary to "legislate" into Exemption 5, a privilege which Congress neither enacted specifically nor intended impliedly. The very privilege which Petitioner would have this Court adopt is now before the appropriate Committees of Congress for further study and legislation, if appropriate.

### Conclusion.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 82-1616

Office - Supreme Court, U.S.

FILED

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CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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UNITED STATES OF AMERICA, PETITIONER

v.

WEBER AIRCRAFT CORPORATION, ET AL.

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**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**REPLY BRIEF FOR THE UNITED STATES**

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---

REPLY BRIEF FOR THE UNITED STATES

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Neither respondents nor amici have successfully refuted our contention that Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), "incorporates the privileges which the Government enjoys \* \* \* in the pretrial discovery context." *FTC v. Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 7-8 (quoting *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975)). Nor can they get around the court of appeals' statement that it was willing to assume that the materials at issue here would be privileged in civil discovery. Finally, they concede that Congress was aware of the



*Machin* privilege when it enacted the FOIA, and they do not explain what sense it would have made for Congress to mandate release under the FOIA when the same documents would be privileged in civil litigation.

## I

A. As we explained in our opening brief (Gov't Br. 14-24), the statements at issue in this case are protected by the plain language of the FOIA. They fall squarely within the terms of Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" (5 U.S.C. 552(b)(5)). The court of appeals correctly held (Pet. App. 4a n.5) that the statements are "intra-agency memorandums or letters"; and the court properly assumed (*id.* at 8a) that the statements "would not be available by law" to a private party in civil discovery. In addition, since the privilege recognized in *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963), does not "substantially duplicate any other FOIA exemption" (*FOMC v. Merrill*, 443 U.S. 340, 360 (1979)), the text of the FOIA provides no reason to believe that Congress intended to modify the scope of the civil discovery privilege.

B. Neither respondents nor amici have pointed to anything in the statutory language that supports their contention that the statements are not protected by Exemption 5. Respondent Mills (Br. 4-5, 14-15) argues that the language of Exemption 5 is unclear in ways unrelated to the question presented by this case. Mills relies on the observation in *EPA v. Mink*, 410 U.S. 73, 86 (1973) (footnote omitted), that Exemption 5 does not specify "whether the Government is to be treated as though it were a prosecutor, a civil plaintiff, or a defendant" and that "the Act, by its

terms, [does not] permit inquiry into the particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." These problems, however, have nothing to do with the present case, and in any event the Court has largely resolved them by concluding that Exemption 5 protects "those documents, *normally* privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (emphasis added; footnote omitted). See *FTC v. Grolier, Inc.*, slip op. 7.

Mills maintains (Br. 24) that "whenever Congress intended to include a privilege for confidential statements, it did so by express language," as in Exemptions 4 and 7. This argument overlooks the fact that Exemption 5 has been held to incorporate the attorney-client privilege (see *FOMC v. Merrill*, 443 U.S. at 355 n.15), which protects confidential communications between an attorney and client.

Mills also erroneously contends (Br. 8, 25-26) that the 1976 amendment of Exemption 3 shows that Exemption 5 was not intended to protect statements such as those at issue here. Not only did that amendment concern a different FOIA exemption, but Congress's purpose was completely consistent with our interpretation of Exemption 5. Before 1976, Exemption 3 allowed nondisclosure of any materials "specifically exempted from disclosure by statute." Pub. L. No. 89-487, § 3(e)(3), 80 Stat. 251. In *FAA Administrator v. Robertson*, 422 U.S. 255 (1975), the Court held that this exemption protected materials that an agency was given discretion to withhold by statute under a broad public interest standard. Congress then amended Exemption 3 to apply only where the statute authorizing nondisclosure leaves the agency no discretion or establishes clear criteria for withholding (5 U.S.C. 552(b)(3)). The purpose of the 1976

amendment was to prevent agencies from withholding information under a vague public interest standard. Under our interpretation of Exemption 5, agencies would not have anything resembling such authority. Instead, Exemption 5 would merely protect those materials covered by established civil discovery privileges.<sup>1</sup>

Amicus Reporters Committee contends (Br. 36-45) that our interpretation of Exemption 5 would permit nondisclosure of information that Congress did not intend to exempt. Three principal cases are cited to support this argument, but none is germane. The first,<sup>2</sup> unlike the present case, concerned a privilege embodied in another FOIA exemption. The second<sup>3</sup> involved materials that might have been privileged in civil discovery but did not constitute "inter-agency or

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<sup>1</sup> Mills' argument (Br. 15-17) based upon the adoption of Fed. R. Evid. 501 is difficult to understand. As we argued in our opening brief (at 23-24), congressional disagreement regarding the privileges available under federal law supports the view that Exemption 5 was intended to incorporate "the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context" (*Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975) (emphasis added)), rather than a limited list of privileges.

Mills argues (Br. 29) that if Exemption 5 incorporates the *Machin* privilege it must also protect statements given in confidence to agencies responsible for investigating and preventing other types of accidents. However, Exemption 5 protects only those materials covered by recognized civil discovery privileges, not any safety information furnished in confidence to a federal agency. See also page 16 note 17, *infra*.

<sup>2</sup> *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978).

<sup>3</sup> *County of Madison v. Department of Justice*, 641 F.2d 1036 (1st Cir. 1981).

intra-agency memorandums or letters" within the meaning of Exemption 5. There is no such problem here. In the third case,<sup>4</sup> amicus contends, the courts refused to require discovery of unprivileged materials because they were included in files that contained privileged materials. However, we are not contending that Exemption 5 permits nondisclosure of unprivileged materials, and both the court of appeals (Pet. App. 8a) and respondents have assumed that the documents at issue here are privileged.

## II

Respondents and amici contend that the legislative history of the FOIA is insufficient to prove that Congress intended Exemption 5 to protect the statements at issue here. This argument is based upon a misunderstanding of the role of legislative history in statutory interpretation, as well as an incorrect evaluation of the relevant legislative history.

A. Legislative history is an aid in interpreting the language of a statute. If the statutory language is clear, it is not necessary to look further. See, *e.g.*, *Dickerson v. New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 7. If there is some ambiguity in the language of the statute, the legislative history may be consulted to see if there is any reason for concluding that Congress did not mean what its words appear to say. In general, the importance of the legislative history is inversely proportional to the clarity of the statutory language.

The language of Exemption 5 is unambiguous. The exemption protects "those documents \* \* \* normally privileged in the civil discovery context" (*NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 149 (footnote omit-

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<sup>4</sup> *Swanner v. United States*, 406 F.2d 716 (5th Cir. 1969).

ted)) and, as the court of appeals correctly assumed, "the witness statements here would be shielded from civil discovery under the *Machin* privilege" (Pet. App. 8a). Thus, the statutory language should control unless the legislative history yields clear proof of a contrary congressional intent.

B. Respondents and amici, on the other hand, take the opposite approach, arguing that the apparent meaning of the statutory language should be violated unless the legislative history clearly indicates that Congress really meant what it seems plainly to have said. Under customary rules of statutory construction, however, the correct result in this case is apparent, for there is nothing in the legislative history showing that Congress intended to require disclosure of confidential statements made to military safety accident investigators; indeed, as we noted in our opening brief (at 25-30), there is much evidence that Congress intended to protect such statements.

Contrary to the suggestion of respondents and amici, the supporting legislative history is as strong as it was in *Merrill*, where the Court held that Exemption 5 protects certain monetary policy directives issued by the Federal Reserve Board. In *Merrill*, the Court began (443 U.S. at 356-357) by inquiring whether these directives would be privileged in civil litigation and thus whether they fell within Exemption 5's plain terms. The Court found authority for a qualified evidentiary privilege for certain "confidential commercial information" (*id.* at 356) but no authority specifically relating to the monetary policy directives. In the present case, by contrast, the privileged status of the very type of statements at issue is well established.<sup>5</sup>

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<sup>5</sup> This contrast is highlighted by the fact that in *Merrill* the government relied on the *Machin* privilege to show that the

The Court next drew support (443 U.S. at 357-358) from statements made by witnesses at the hearings on the FOIA regarding the need to protect a loose category of "confidential commercial information" such as "information relating to the purchase or sale of real estate, materials, or other property." \* One statement relating to Federal Reserve open market operations was found. *Id.* at 358 & n.21. As our opening brief (at 26-29) showed, there is at least equal support in these same hearings for the *Machin* privilege.

Finally, the *Merrill* Court noted (443 U.S. at 359) the statement in the House report (H.R. Rep. 1497, 89th Cong., 2d Sess. 10 (1966)), that "a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract." The Court analogized this information to the Federal Reserve's monetary policy directives (443 U.S. at 359, 360). While we agree fully with this reasoning, it bears emphasis that the Court in *Merrill* relied upon a rough analogy and that the monetary policy directives do not concern the awarding of contracts.

In this case, we think it is reasonable to infer from the following facts that Exemption 5 was specifically intended to shield statements like those at issue here: such statements would not have been protected by the

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monetary policy directives were privileged because they constituted "'official government information' whose disclosure would be harmful to the public interest" (*FOMC v. Merrill*, 443 U.S. at 355 n.17).

\* 443 U.S. at 358 (citing *Administrative Procedure Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 418 (1965) (hereinafter cited as *1965 Senate Hearings*)).

version of Exemption 5 referred to the Senate committee but fall within the plain meaning of Exemption 5 as amended by the committee and ultimately enacted; the Senate committee stated that its amendment was made in response to suggestions voiced at the committee hearings; a number of government witnesses at those hearings referred specifically to the very type of statements involved here, noted that such statements were apparently not shielded from compulsory disclosure under the bill then under consideration, and argued that disclosure of such statements should not be required; and no witness or member of Congress suggested during the hearings that mandatory disclosure of such statements was desirable. See Gov't Br. 25-30.

C. Relying on discussion in *EPA v. Mink*, 410 U.S. at 87-91, respondent Weber (Br. 8-10) and several amici (Forgecraft Am. Br. 13; Badhwar Am. Br. 15) argue that Congress could not have meant to protect witness statements under Exemption 5 because that provision does not apply to purely factual materials. But as noted in our opening brief (at 34), the discussion in *Mink* was limited to the deliberative process privilege, which does not extend to factual material. Exemption 5 itself, however, is not so limited but protects purely factual material covered by other privileges, such as the attorney-client and work-product privileges.

D. Respondent Mills (Br. 21-22) maintains that the Senate committee's sole reason for amending Exemption 5 was to protect documents in which facts are interspersed with matters of law and policy. However, this theory does not adequately explain the language of the amendment, which substituted the phrase "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party



in litigation with the agency" for the phrase "intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy." This amendment obviously did more than protect those documents in which "matters of law or policy" were mixed with factual information. Instead, the amendment changed Exemption 5 from a narrow provision limited in large part to materials covered by the deliberative process privilege to a much broader provision applicable to other privileged materials, including purely factual material such as work product.

E. Respondents note (Weber Br. 12-17; Mills Br. 20 n.12) that some of the references to the *Machin* privilege during the congressional hearings were made while discussing Exemption 7.<sup>7</sup> But that fact lends little support to their argument. When the statements in questions were made, Exemption 5 was restricted to documents "dealing solely with matters of law or policy" and thus bore little relationship to statements made in confidence to military safety investigators. Exemption 7, which protected "investigatory records compiled for law enforcement purposes," was more closely related, and therefore some of the witnesses referred to that exemption in the course of recommending that such statements be protected. When Congress amended Exemption 5 to protect materials normally privileged in civil discovery, it accommodated the witnesses' concerns. It is hardly unusual for Congress to adopt a practical recommendation by draftsmanship of its own design. It is also noteworthy that this Court in *Merrill* relied upon statements addressed to Exemption 7 even though that

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<sup>7</sup> But see 1965 *Senate Hearings* 196 (statement of Assistant Attorney General Schlei). See Gov't Br. 27.

case dealt solely with Exemption 5. See 443 U.S. at 358.\*

F. Respondents (Weber Br. 18; Mills Br. 32-35) and amicus Reporters Committee (Br. 35 n.4) argue that Congress's failure in recent years to adopt proposed legislation codifying the *Machin* privilege shows that Congress did not intend to incorporate the privilege into Exemption 5 when the FOIA was enacted. It is settled, however, that adverse inferences should not be drawn from an agency's request for clarifying legislation. See, e.g., *Black v. Magnolia Liquor Co.*, 355 U.S. 24, 27 (1957); *United States v. Turley*, 352 U.S. 407, 415 n.14 (1957); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47-48 (1950). Furthermore, it seems clear that Congress's failure to enact the requested legislation is not evidence of disagreement with our interpretation of Exemption 5 or with the *Machin* privilege.<sup>9</sup>

In the Ninety-Sixth Congress, well before this case was argued or decided in the court of appeals, the armed forces attempted to eliminate any lingering uncertainty by seeking enactment of a statute protecting several portions of safety reports, including "statements or information obtained under an express

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\* Indeed, the Defense Department references to the *Machin* privilege quoted in our opening brief (at 26-27) appear in the same portion of one of the statements upon which Merrill relied (443 U.S. at 358). See 1965 Senate Hearings 418.

<sup>9</sup> In any event, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Jefferson County Pharmaceutical Association v. Abbott Laboratories*, No. 81-827 (Feb. 23, 1983), slip op. 15 n.27 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

promise of confidentiality from a witness or manufacturer." H.R. 7552, 96th Cong., 2d Sess. (1980). On October 1, 1980, the House Committee on Armed Services reported favorably on the bill (H.R. Rep. 96-1445, 96th Cong., 2d Sess. 2-3 (1980)), noted that it applied to materials now protected by a non-statutory privilege (*id.* at 2-3), and observed presciently (*id.* at 4) that "in an increasingly litigious society, \* \* \* the status of aircraft accident safety reports should not be supported by such a slender reed."<sup>10</sup> The bill, however, was not passed during the short time before the Ninety-Sixth Congress's term expired.

In 1983 a similar measure (which is broader than the privilege at issue in this case)<sup>11</sup> was passed by the Senate. S. 675, 98th Cong., 1st Sess. § 1009 (1983). See Senate Comm. on Armed Services, *Omnibus Defense Authorization Act of 1984*, S. Rep. 98-174, 98th Cong., 1st Sess. 249-250 (1983). The House bill did not contain such a provision, and the conferees deferred passage pending the submission of further information by the Department of Defense. S. Conf.

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<sup>10</sup> The report stated (H.R. Rep. 96-1445, *supra*, at 3) that "there is no existing statutory protection of any kind for military aircraft accident safety reports." This meant that the *Machin* and deliberative process privileges, upon which the military now relies, are not codified. It did not mean that Exemption 5 does not incorporate those privileges (compare *Mills Br.* 33-34). Exemption 5 is not an independent source of protection but instead incorporates civil discovery privileges, including those recognized in case law. See note 1, *supra*.

<sup>11</sup> The bill also protects the investigators' deliberations, discussions, analysis, opinions, conclusions, findings, and recommendations, as well as the life science reports, which generally reflect the opinions of medical and psychological experts. See S. Conf. Rep. 98-213, 98th Cong., 1st Sess. 264 (1983).

Rep. 98-213, 98th Cong., 1st Sess. 264 (1983). Obviously, these events do not support respondents' or amici's argument.<sup>12</sup>

<sup>12</sup> Respondent Weber (Br. 25) contends that the statements at issue must be disclosed on the ground that the government failed to show that promises of confidentiality were made. However, both courts below concluded otherwise. See Pet. App. 4a ("issue is whether Exemption 5 permits [nondisclosure of] statements of military personnel given under a promise of confidentiality \* \* \*"); *id.* at 23a-24a. An uncontroverted affidavit filed in district court established that the statements were obtained under a pledge of confidentiality in the course of an authorized Air Force safety investigation. R.E. 42, Affidavit of Maj. Gen. Len C. Russell, Commander Air Force Inspection and Safety Center 2. Contrary to Weber's assertion (Br. 6-7) the then-applicable Air Force regulation (A.F. Reg. 127-4 (Jan. 1, 1973) (Pet. App. 31a-32a)) clearly provided that such statements were privileged and confidential and were to be used "solely within the [Air Force] \* \* \* to prevent accidents." And since at least 1963, the courts have recognized that it is the policy of the military services to make such promises of confidentiality. See *Machin v. Zuckert*, 316 F.2d at 339.

Weber also maintains (Br. 32) that any protection offered by Exemption 5 was waived because an Air Force employee inadvertently allowed Hoover's counsel to see portions of the documents during a deposition. This claim was not raised in or decided by the court of appeals and thus need not be addressed by this Court. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 163-164; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, "[a]n unauthorized disclosure of documents does not \* \* \* constitute a waiver of the applicable FOIA exception." *Medina-Hincapie v. Department of State*, 700 F.2d 737, 742 n.20 (D.C. Cir. 1983); see also *Murphy v. FBI*, 490 F. Supp. 1138, 1142 (D.D.C. 1980); *Safeway Stores, Inc. v. FTC*, 428 F. Supp. 346, 347 (D.D.C. 1977). *Cooper v. Department of the Navy*, 594 F.2d 484 (5th Cir.), cert. denied, 444 U.S. 926 (1979) (see Weber Br. 32-33), which did not concern witness statements, held that a waiver occurred where a document was "furnished to one side of a

## III

A. Like the court of appeals (see Pet. App. 8a), respondents have not questioned the fact that statements such as those involved in the present case fall within the civil discovery privilege recognized in *Machin*. Amici, however, maintain that the *Machin* privilege is limited to statements made by nonmilitary witnesses. Badhwar Am. Br. 35-41; Forgecraft Am. Br. 5-8; Reporters Committee Am. Br. 13-14.<sup>13</sup> Their argument is based upon a misreading of the *Machin* opinion.

In *Machin*, the sole survivor of an Air Force plane crash brought suit against the manufacturer of the plane's propeller assemblies and subpoenaed the Air Force safety report, which included both confidential witness statements and the report of the mechanics who had examined the records (316 F.2d at 337-338). Holding that the confidential witness statements were privileged, the District of Columbia Circuit stated (*id.* at 339):

We agree with the Government that when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program and perhaps even, as the Secretary here claims, impair the national secu-

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lawsuit and not to the other" (594 F.2d at 488). Here, according to Weber (Br. 32), all parties to the underlying suit have seen the document but none has a copy.

<sup>13</sup> By contrast, respondent Weber maintains (Br. 8) that the confidential statements of private parties cannot be withheld under Exemption 5 because they are not "inter-agency or intra-agency" documents. We disagree with this argument, which would appear to necessitate disclosure of some attorney-client and work-product materials that Congress intended to protect. In any event, this question need not be addressed in the present case, which concerns statements by Air Force personnel.

rity by weakening a branch of the military, the reports should be considered privileged.

By contrast, the court held that these considerations did not justify withholding the mechanics' report because "[t]heir investigations and reports would not be inhibited by knowledge that their conclusions might be made available for use in future litigation" (316 F.2d at 340). The court instructed the district judge to review the reports *in camera* to determine whether the deliberative process privilege applied (*id.* at 340-341).

Amici base their argument upon the statement in *Machin* that the subpoena had been properly quashed "[i]nsofar \* \* \* as [it] sought to obtain testimony of private parties who participated in the investigation" (316 F.2d at 339 (emphasis added)). They also rely upon a sentence in the Air Force affidavit stating that promises of confidentiality were needed to obtain frank disclosures from aircraft manufacturers' representatives (*ibid.*). These incidental references, however, fail to show that the *Machin* privilege was limited to statements made by private parties. The court's reason for accepting the privilege fully applies to statements by military as well as civilian witnesses. The court appears to have used the term "private parties" merely to describe the individuals who had furnished confidential statements and to distinguish them from the mechanics who had examined the wreckage.

In any event, the weight of authority draws no distinction between the statements of military and nonmilitary witnesses. See *Cooper v. Department of Navy*, 558 F.2d 274, 277-278 (1977), modified on other grounds, 594 F.2d 484 (5th Cir.), cert. denied, 444 U.S. 926 (1979); *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975); *Theri-*

*aunt v. United States*, 395 F. Supp. 637 (C.D. Cal. 1975); *Rabbitt v. Department of the Air Force*, 401 F. Supp. 1206 (S.D.N.Y. 1974); 2 D. Louisell & C. Mueller, *Federal Evidence* § 230, at 755 & n.25 (1978); *McCormick on Evidence* § 107, at 230 n.6 (E. Cleary 2d ed. 1972); J. Weinstein & M. Berger, *Evidence* ¶ 509[07], at 509-47 n.6 (1982); *id.* ¶ 510[03], at 510-23 & n.13; C. Wright & A. Miller, *Federal Practice and Procedure* § 2019, at 169 n.22 (1970).<sup>14</sup> The references to the *Machin* privilege in the legislative history of the FOIA draw no distinction between military and other witnesses (see Gov't Br. 26-29). Likewise, Air Force regulations have never drawn such a distinction. Nor is there any sound reason for adopting such a restriction. Indeed, it is arguable that the privilege is more essential in the case of military personnel because they are often the only ones able to provide information about human errors that cannot be detected from examination of the tangible evidence.

Amicus Forgecraft argues (Br. 7) that a distinction between military and other witnesses is sensible because military personnel, unlike civilians, may be ordered to provide statements to safety investigators. However, the authority to compel statements hardly ensures the frank disclosures that the *Machin* privilege is designed to promote. Forgecraft also contends (Br. 8) that while the *Machin* privilege may induce candid admissions by private parties, whose employers and supervisors will never learn of their statements, it is unlikely to have a similar effect upon military witnesses, who know that their superiors

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<sup>14</sup> The only contrary holding is *McFadden v. Avco*, 278 F. Supp. 57, 59-60 (M.D. Ala. 1967); see also *O'Keefe v. Boeing Co.*, 38 F.R.D. 329, 334 (S.D.N.Y. 1965) (dictum; privilege held waived).



will review their statements for purposes of safety. This argument fails because, among other things, it ignores the rules strictly prohibiting the military from using such statements against the witness. See A.F. Reg. 127-4, ¶ 2-5.b (Jan. 18, 1980) (Gov't Br. App. 2a).<sup>15</sup>

<sup>15</sup> Taking almost precisely the opposite tack, amicus Reporters Committee suggests (Br. 21-22) that, because of these protective rules, the privilege is not needed to induce frank admissions by military witnesses. This argument ignores the role played by the privilege in seeing that the spirit of the rules is honored. By preventing public release of the statements, the privilege helps to ensure that they are examined only by those persons within the military responsible for flight safety. It consequently reduces the chances of a witness's admissions being held against him. Perhaps more important, the privilege encourages candor by military witnesses for whom admissions might cause other types of harm, such as prejudice in civil litigation, damage to reputation, and impairment of post-military employment prospects.

Amici Badhwar and Goldberg argue (Br. 55-56) that the Air Force's "promise of confidentiality is no promise at all" due to Air Force regulations allowing very limited disclosure of confidential witness statements under certain special circumstances. This argument is far-fetched. Under A.F. Reg. 127-4, ¶ 2-5.d(3) (Jan. 18, 1980) (Gov't Br. App. 3a), a person accused in a trial by court-martial may examine the statements of any witness who testifies against him. Such disclosure is required by the Jencks Act, 18 U.S.C. 3500. However, to minimize the effect of disclosure, it is the practice of the Air Force to request that the courtroom be closed when the witness testifies and to resist adverse rulings on this issue. Under A.F. Reg. 127-4, ¶ 5-4.b (Jan. 18, 1980), when a person is found by a safety board to have been a cause of a mishap, he is permitted to review the board's report, including witness statements, for purposes of rebuttal. However, this review takes place in a closed room, the report may not be removed or reproduced in whole or part, and the individual is admonished not to disclose its contents. See A.F. Reg. 127-4, Attachment 4 (Jan. 18,

B. A dominant theme in respondents' and amici's briefs is that the *Machin* privilege is neither effective nor necessary. But that contention is both irrelevant to respondents' FOIA request (see Gov't Br. 34-35) and dramatically refuted by the persistent efforts of many persons, including respondents and amici, to obtain release of statements furnished in confidence to military safety investigators. The parallel investigations conducted by the Air Force and other services demonstrate the usefulness of the *Machin* privilege with almost scientific precision. The unprivileged statements furnished to the accident or collateral investigation serve as a control group; they are very close approximations of the statements that witnesses would provide to the safety investigators if confidentiality could not be assured. Statements made in the collateral investigation are available to the public, but respondents, amici, and others nevertheless seek access to the statements made to the safety investigators. The only explanation for these efforts is a belief that the privileged statements contain valuable information not found in the unprivileged statements. This is strong testimony to the value of the privilege and proof that respondents and amici do not really accept their own arguments.<sup>16</sup>

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1980). Carefully restricted disclosure under these circumstances does not undermine the value of the *Machin* privilege. Amici are incorrect in suggesting (Badhwar Am. Br. 55) that A.F. Reg. 127-4, ¶ 2.5.d(1) (Jan. 18, 1980) (Gov't Br. App. 3a) requires release of witness statements under the FOIA. That provision expressly refers only to Part I (i.e., the factual portion) of the safety report and not to witness statements. See A.F. Reg. 127-4, ¶ 2.5.d (Jan. 18, 1980) (Part I disclosable under the FOIA); *id.* at ¶ 5.1.a (describing two-part report); *id.* at ¶ 5.2.b(2) (witness statements in Part II).

<sup>16</sup> Mills suggests (Br. 10, 29) that the *Machin* privilege is not needed because there is no comparable privilege for state-

In an effort to show that the privilege is not needed, respondents (Weber Br. 23-24; Mills Br. 10, 29) and amici Badhwar and Goldberg (Br. 46-52) point to the practices of the National Transportation Safety Board, which investigates civilian aircraft accidents and does not receive confidential witness statements. Amici argue (Badhwar Am. Br. 9) that the NTSB "has responsibilities, for civil aviation, that are identical to military air crash safety investigation boards" and that the NTSB's "record of assuring air safety is far better than that of the military safety boards." This argument overlooks enormous differences between civil and military aviation, as well as between the responsibilities and authority of the NTSB and the military services. Amici's assertion that the NTSB's safety record is better than the military's because the accident rate for civil aviation is lower apparently rests upon the view that piloting a heavily armed

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ments given in confidence to investigators responsible for safety in other fields. Mills overlooks the fact that for much the same reasons that prompted judicial recognition of the *Machin* privilege, Congress has enacted numerous statutes limiting the disclosure or use of such information. See, e.g., 15 U.S.C. 1271 (information obtained by Consumer Product Safety Commission under Federal Hazardous Substances Act inadmissible in criminal prosecution of person from whom obtained); 21 U.S.C. 373 (information obtained under Federal Food, Drug, and Cosmetic Act inadmissible in criminal prosecution of person from whom obtained); 42 U.S.C. 2240 (licensee's nuclear accident report inadmissible in damages action); 46 U.S.C. 234 (Coast Guard official forbidden to divulge identity of licensed merchant marine officers providing information regarding vessel defects); 49 U.S.C. 320(f) (motor carrier's report to ICC regarding accident, as well as ICC report, inadmissible in damages action). See also 33 U.S.C. 930(c) (accident report on death or injury of longshoreman inadmissible); 45 U.S.C. 33, 41 (railroad accident report); 49 U.S.C. 1441(e) (NTSB report).

state-of-the-art supersonic fighter under simulated combat conditions is not inherently more dangerous than flying a scheduled commercial airliner from New York to Chicago. By amici's reasoning, grand prix race car drivers must be less skillful than the average motorist because their accident rate is much higher. The plain fact, of course, is that military aviation must often confront safety problems far different and more severe than those faced by civil aviation. This fully justifies the military's use of different and additional safety measures. Furthermore, the military has a greater need for fast corrective action when safety problems develop<sup>17</sup> and is in a far better position than civil aviation authorities to implement safety changes without breaching confidentiality.<sup>18</sup>

C. Finally, respondents and amici contend that the *Machin* privilege is not worth the cost because it prevents disclosure of information that would be useful in many ways. Their argument completely misses the point because the only effect of the privilege is to

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<sup>17</sup> In civil aviation, when a problem of unknown origin occurs, time-consuming and laborious precautions can be taken until the cause is discovered. If necessary, all planes of the type involved can be removed from service. At worst, such measures cause inconvenience to the flying public. The military, by contrast, often cannot afford these luxuries. Grounding certain types of aircraft while a leisurely safety investigation is conducted may impair the national defense, and under some circumstances removing even a single plane from service must be avoided if possible.

<sup>18</sup> In the typical military accident, the flight crew, ground crew, and air traffic controllers are military personnel; the aircraft is owned and maintained by the military and built to its specifications; and if the mishap occurs at an airport, the airport is likely to be owned and operated by the military as well. Accordingly, the military can often unilaterally correct problems disclosed by its safety investigations. The NTSB, on

prevent public disclosure of information that witnesses would never have revealed unless confidentiality had been assured. In the long run, therefore, abolition of the privilege (and that is the effect of the decision below) would not increase the information available to litigants, the press, or anyone else. Its only effect would be to decrease the information available to those responsible for military aviation safety.

### CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE  
*Solicitor General*

JANUARY 1984

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the other hand, investigates accidents involving persons it does not employ and equipment and facilities it does not own or operate. Its findings and recommendations can be implemented only with the knowledge and participation of others. This makes it much more difficult to implement safety changes without breaching confidentiality and thereby reduces the utility of confidential disclosures. See also Gov't Br. 36 n.29.

No. 82-1616

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WEBER AIRCRAFT CORPORATION, ET AL.,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH  
CIRCUIT

BRIEF OF INDERJIT BADHWAR  
AND DONALD J. GOLDBERG  
AS AMICI CURIAE  
IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Are witness statements containing solely factual matter, which were made during a Governmental investigation into an air crash, and which were not prepared by attorneys or in anticipation of litigation, exempt from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5)?



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No. 82-1616

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OCTOBER TERM, 1983

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RESPONDENTS

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BRIEF OF INDERJIT BADHWAR  
AND DONALD J. GOLDBERG  
AS AMICI CURIAE

Messrs. Inderjit Badhwar and Donald J.  
Goldberg, with the consent of the  
parties, submit this Brief as Amici  
Curiae in support of Respondents.

INTEREST OF INDERJIT BADHWAR AND  
DONALD J. GOLDBERG

Messrs. Badhwar and Goldberg are journalists on the staff of nationally syndicated columnist Jack Anderson. They are investigating the military's aircraft accident investigation program, and are focusing on such questions as: Why is the Air Force accident rate so much higher than the civilian accident rate? Has the military's practice of conducting its accident investigations in secret, and maintaining most portions of its accident reports secret, enhanced or detracted from aviation safety? Particularly since the National Transportation Safety Board conducts its investigations of civil aircraft accidents in public, and makes its accident reports public, is there any justification for the military's practice of secrecy?

Messrs. Badhwar and Goldberg have been frustrated in their attempts to obtain through the Freedom of Information Act pertinent information and documents, including witness statements such as those at issue in this case, because of the interposition of Exemption 5 and the asserted "privilege" advanced by Petitioner herein. The Air Force has been using Exemption 5 and the asserted "privilege" not only to shield witness statements, but also to prevent disclosure of voluminous other data relating to accident investigations, including recommendations for corrective action contained in the final reports of investigations, and information reflecting whether such recommendations were implemented. Messrs. Badhwar and Goldberg will soon institute an action in the United States District Court seeking the

information that has been withheld from them.

The parties to this case necessarily must focus upon the facts and the law in the context of their own interests and the particular circumstances of this case. But the question of the extent to which purely factual witness statements involving military air crashes, not taken by attorneys or in anticipation of litigation, are available to the public implicates interests transcending the specific and narrow interests of Petitioner and Respondents in this litigation. Although the propriety of the Government's broad assertion of "privilege" and its use of Exemption 5 to shield many elements of military air crash investigations, including the final reports of military safety investigation boards, is not before this Court, a



ruling sustaining Petitioner's assertion of privilege with respect to witness statements might be relied upon by the Government in defense of its broader assertion of privilege. Since different legal issues are involved, that reliance would be misplaced. Nonetheless, Amici Curiae seek to avoid that result not only because they believe the decision below was correctly decided, but also because acceptance of the Government's broad assertion of privilege would substantially hinder the free flow of information on the readiness of the Nation's military personnel, the quality of its equipment, and the manner in which military commanders investigate aircraft mishaps occurring under their command -- all matters of grave public concern.

When it enacted the Freedom of Information Act, Congress placed high

regard upon the role of journalists to obtain and report the public's information to the Nation. See Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 17 (1974). It highlighted the Act's value to "the conscientious newspaperman who was seeking material for a serious article that he is preparing on the operations of a particular agency of Government." 112 Cong. Rec. 13658 (1966) (remarks of Rep. Anderson); see also id. at 13648 (remarks of Rep. Pucinski). Congress emphasized the need, even after passage of the Act, for the continuing vigilance of the press, the public, and the Congress. Id. (remarks of Rep. Laird). Messrs. Badhwar and Goldberg appear as Amici Curiae in this case with those responsibilities.

SUMMARY OF ARGUMENT

A. This Court has held that purely factual documents like the witness statements at bar are not exempt from disclosure under the Freedom of Information Act ("FOIA") by Exemption 5. EPA v. Mink, 410 U.S. 73, 86-89 (1973). Congress' intent that such factual materials not be within Exemption 5 is clear from the carefully developed legislative history, including discussion particularly directed to the release of witness statements.

B. Petitioner urges a construction of legislative history that may not be reconciled with this Court's analysis of the same history in Mink. 410 U.S. at 90-91. It rests its entire argument upon a brief clause taken out of context in a Senate Report, which was not specifically directed to Exemption 5 at all. Its

argument ignores the balance and principal thrust of the legislative history commending the release of purely factual material, and if accepted, would mean that every suggestion or criticism of FOIA made in Congressional Hearings should be read into the Act. Such a broadening of FOIA's Exemptions, by implication, may not be squared with clear Congressional intent that the Act be viewed as a disclosure statute, and that its exemptions be narrowly construed so that there are clearly defined "workable standards" for applying them.

C. Petitioner seeks a special exemption for a select class of documents -- witness statements not taken by attorneys or in anticipation of litigation, but for military air crash safety investigations. Under the case law as of the enactment of FOIA, such

statements as those at bar were subject to discovery and "[w]e must assume . . . that Congress legislated against the backdrop of this case law." Mink, supra, 410 U.S. at 89. Generally, witness statements not taken in anticipation of litigation are available in discovery and through FOIA. These witness statements should not be accorded special treatment.

D. The National Transportation Safety Board has responsibilities, for civil aviation, that are identical to military air crash safety investigation boards. The NTSB conducts its investigations in public, and routinely makes its witness statements available. Its record of assuring air safety is far better than that of the military safety boards. Actual practice thus refutes Petitioner's claim that safety investigations best proceed in secret and that witness

statements must be withheld from the public.

E. The better view of the law is that no special protection should extend to these documents. At the very least, however, the Record in this case is inadequate to warrant this Court's adoption of a special privilege, as Petitioner urges, to exempt these witness statements from FOIA. Many questions, including such basic ones as whether these witnesses were actually promised confidentiality, and how the Air Force could square promises of confidentiality with its own Regulations permitting disclosure in certain circumstances (including as required by FOIA), remain to be answered in a full hearing. Thus, if the Court disagrees with our position that the asserted "privilege" is not within Exemption 5, and further disagrees

with our position that there can be no justification for such a special privilege, it should remand this case so that a proper Record, testing the asserted basis for the privilege, may be made.

### ARGUMENT

**WITNESS STATEMENTS CONTAINING SOLELY FACTUAL MATTER, WHICH WERE MADE DURING A GOVERNMENTAL INVESTIGATION INTO AN AIR CRASH, AND WHICH WERE NOT PREPARED BY ATTORNEYS OR IN ANTICIPATION OF LITIGATION, ARE NOT SHIELDED FROM DISCLOSURE UNDER EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT.**

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The law of FOIA is familiar. The statute is a disclosure statute. E.g., Chrysler Corp. v. Brown, 441 U.S. 281, 290 & n.10 (1979); see also 112 Cong. Rec. 13654 (1966) (remarks of Rep. Rumsfeld).<sup>1/</sup> Its exemptions "must be

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<sup>1/</sup> "It is our intent that the courts interpret this legislation broad-  
(footnote continued)



narrowly construed" and "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." Department of Air Force v. Rose, 425 U.S. 352, 361 (1976). Congress crafted the statute with specificity in order to provide concrete, "workable standards" for determining when information must be released. See, e.g., FTC v. Grolier, Inc., 462 U.S. \_\_\_, 103 S.Ct. 2209, 2214-2215 (1983); EPA v. Mink, 410 U.S. 73, 79 (1973); S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) ("Senate Report"); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6, 1966 U.S. Code Cong. & Ad. News 2418, 2423.

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(footnote continued from previous page)  
ly, as a disclosure statute and not as an excuse to withhold information from the public."

Representative Rumsfeld was one of the sponsors of the bill that became FOIA and was a member of the House Committee that had studied the bill and reported it favorably.

Exemption 5 of FOIA, 5 U.S.C. § 552(b) (5), exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." This Court has consistently applied this Exemption in conformity with the guiding principles underlying FOIA. As recently as last Term this Court stated, "In keeping with the Act's policy of 'the fullest responsible disclosure,' . . . Congress intended Exemption 5 to be 'as narrow[] as [is] consistent with efficient Government operations.'" Grolier, supra, 103 S.Ct. at 2212 (citing legislative history). The Court has expressed uncertainty that Exemption 5 "was intended to incorporate every privilege known to civil discovery," Federal Open Market Committee v. Merrill, 443 U.S. 340, 354 (1979), and

has looked to legislative history to determine whether a privilege asserted to be embraced by Exemption 5 may fairly be said to have been within Congressional intention at the time the statute was passed. See id. at 354-360. "[A] claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution," id. at 355, and must be consistent with the "primary purpose" of Exemption 5 "to enable the Government to benefit from 'frank discussion of legal or policy matters.'" Grolier, supra, 103 S.Ct. at 2212 (citing legislative history); see also FBI v. Abramson, 456 U.S. 615, 630 (1982) ("purposes behind Exemption 5 [are] protecting the give-and-take of the decisional process").

Petitioner makes no claim that the documents at issue are protected by

"executive privilege or the attorney privilege"; instead it seeks to extend Exemption 5 to reach documents that contain the kind of "purely factual, investigative" matter that this Court held in EPA v. Mink, supra, 410 U.S. at 86-91, was not within the purview of Exemption 5. The documents at bar do not embody "legal or policy matters" at all; they are merely raw witness statements, reciting facts, that concededly were prepared neither by attorneys nor in anticipation of litigation.

Petitioner asks this Court either to distort legislative history to rationalize the implied existence of a special privilege for a select group of factual documents, or to abandon the approach of Mink and Merrill and make Exemption 5 boundless. To adopt either of Petitioner's views would create uncertainty

with respect to the scope of Exemption 5. Instead of providing a workable standard, it would make the exemption an open-ended source of protection for factual documents generated in the course of Governmental investigations. The Court of Appeals properly rejected Petitioner's contentions, and its decision should be affirmed.

**I. CONGRESS INTENDED THAT PURELY  
FACTUAL WITNESS STATEMENTS NOT BE  
EXEMPT FROM DISCLOSURE UNDER  
EXEMPTION 5.**

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**A. This Court Has Clearly  
Held That Purely Factual  
Documents Of This Kind Are  
Not Within Exemption 5.**

Ten years ago this Court studied the legislative history of Exemption 5, and its relationship with the kind of factual documents at issue here, and unequivocally concluded that such documents were not included within the Exemption:

"[T]he legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions . . . are privileged from inspection.'

\* \* \*

"But the privilege that has been held to attach to intragovernmental memoranda clearly has finite limits, even in civil litigation. . . . [M]emoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government. . . . We must assume, therefore, that Congress legislated against the backdrop of this case law, particularly since it expressly intended 'to delimit the exception [5] as narrowly as consistent with efficient Government operation.' . . . Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.

"Nothing in the legislative history of Exemption 5 is con-

trary to such a construction."  
Mink, supra, 410 U.S. at 86-89  
(emphasis added; footnotes  
omitted).

B. Pertinent Legislative  
History Illustrates Con-  
gress' Clear Intent That  
Purely Factual Witness  
Statements Not Be Shield-  
ed By Exemption 5.

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S.1160, the bill that was enacted as  
FOIA in 1966, was "based" on a prior  
Senate bill, S.1666, passed by the Senate  
in July 1964. Senate Report 4.<sup>2/</sup> The  
Senate Report accompanying S.1666, when  
describing Exemption 5, declared, "All  
factual material in Government records is  
to be made available to the pub-  
lic . . . ." S. Rep. No. 1219, 88th  
Cong., 2d Sess. 7 (1964) (emphasis in  
original). In further discussing Exemp-

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<sup>2/</sup> S.1666 was passed by the Senate, but  
insufficient time remained in the Eighty-  
Eighth Congress for its consideration by  
the House. It was reintroduced in the  
Eighty-Ninth Congress as S.1160. Senate  
Report 4.



tion 5, the Report states, "[I]t will be noted that there is no exemption for matters of a factual nature." Id. at 14.

When S.1666 was discussed on the Senate floor, Senator Dirksen spoke in favor of the bill and noted how it would remedy one particular example of "departmental and agency abuse" involving the failure to disclose witness statements. 110 Cong. Rec. 17088-17089 (1964) (remarks of Sen. Dirksen). He related the story of a farmer who had been told by the Department of Agriculture that his acreage allotment was being reduced because of certain information against him. When he, and later Senator Dirksen, tried to determine from the Department what this information was, the Department advised them that the information was contained in witness statements that had been given "on a confidential basis" and

thus could not be released. Passage of S.1666, Senator Dirksen concluded, was an "essential step" to avoid this kind of abuse. The bill passed the Senate. Id. at 17089.

Later in July 1964, the Senate reconsidered S.1666 at the request of Senator Humphrey, who stated that "additional clarification would be helpful." 110 Cong. Rec. 17667 (1964) (remarks of Sen. Humphrey). He stated that he had "prepared certain amendments which would . . . assist in clarifying these sections," but that it might "be possible to accomplish the objective of removing these potential ambiguities or uncertainties through a more complete exposition of the committee's intention without actually having to amend S.1666." Id. Senator Humphrey expressed concern that, as Exemption 5 was then written, it would

not exempt memoranda prepared by agency employees giving their evaluation of the credibility of evidence obtained from witnesses or other sources, and memoranda "summarizing facts used as a basis for recommendations for agency action." Id. Senator Humphrey suggested an amendment changing the language of the Exemption so that it would exempt "intra-agency or interagency memorandums or letters dealing with matters of fact, law or policy." Senator Long, the sponsor of S.1666, stated that this proposal was unacceptable, because:

"The suggestion with respect to [Exemption 5], adding 'matters of fact' to 'matters of law or policy' would result in a great lessening of information available to the public and to the press." Id. (remarks of Sen. Long).

Senator Long further clarified that:

"[The documents described by Senator Humphrey lead] me to point out that there is nothing in this bill which would over-

ride normal privileges dealing with the work product and other memorandums summarizing facts used as a basis for recommendations for agency action if those facts were otherwise available to the public." Id. at 17667-17668.<sup>3/</sup>

The Senate did not accept Senator Humphrey's proposed change to Exemption 5, and the bill passed the Senate a second time, without any pertinent change. Id. at 17668.

**C. Petitioner Misreads Legislative History To Assert That Exemption 5 Embraces Purely Factual Witness Statements.**

As originally introduced in the Eighty-Eighth and Eighty-Ninth Congresses, the bills that ultimately became FOIA, S.1666 and S.1160, contained an exemption for "inter-agency or intra-

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<sup>3/</sup> We reiterate that the witness statements at bar are not asserted to be deliberative material within an "executive privilege" or work product prepared in anticipation of litigation.

agency memorandums or letters dealing solely with matters of law or policy." S. Rep. No. 1219, 88th Cong., 2d Sess. 17 (1964) (S.1666; emphasis added); Senate Report 1 (S.1160; emphasis added). After the House and Senate Hearings, Exemption 5 was changed to substantially its present form. See Mink, supra, 410 U.S. at 89-91. Petitioner argues broadly that "it may reasonably be inferred that one of the suggestions that precipitated [this change in Exemption 5] concerned the Machin privilege" for witness statements taken in military air crash safety investigations (Pet. Br. 26). The argument fails for several reasons.

1. This Court Held In Mink That Congress Changed The Language Of Exemption 5 For A Specific Reason Different From What Petitioner Contends.

After studying the pertinent history, this Court concluded in Mink that Congress changed Exemption 5's language to accommodate one particular criticism that had nothing to do with the asserted "Machin privilege" for purely factual witness statements.

"The [prior] formulation was severely criticized . . . on the ground that it would permit compelled disclosure of an otherwise private document simply because the document did not deal 'solely' with legal or policy matters. Documents dealing with mixed questions of fact, law, and policy would inevitably, under the proposed exemption, become available to the public. As a result of this criticism, Exemption 5 was changed to substantially its present form." Mink, supra, 410 U.S. at 90-91 (emphasis added).

This particular criticism appeared numerous times in the testimony of several persons. See, e.g., Administrative Procedure Act: Hearings Before the Subcomm. on Administrative Practice and Procedures of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 36, 205, 236, 366-367, 383, 406-407, 417, 437, 445-446, 450, 490 (1965) ("Senate Hearings"); Federal Public Records Law: Hearings Before the Subcomm. of the House Comm. on Government Operations, 89th Cong., 1st Sess. 27, 208, 220, 224, 229-230, 256 (1965) ("House Hearings"). As the Court found, the change was intended to reach documents containing mixed questions of fact, law, and policy, where factual matter is "inextricably intertwined" with legal or policy matter. It was not intended to shield purely factual matter such as the witness statements at issue. See Mink, supra, 410 U.S. at 91-92.



2. **Petitioner's Argument  
Rests Solely Upon A  
Solitary Phrase In The  
Legislative History, Taken  
Out Of Context, In Disre-  
gard Of The Balance And  
Principal Thrust Of That  
History And The Congres-  
sional Intent It Reflects.**

a. Petitioner rests its argument solely upon a brief passage from the Senate Report stating that the change discussed above "'reflect[ed] suggestions made to the committee in the course of the hearings.'" (Pet. Br. 26). This excerpt has been taken out of context, and is quoted in full below. It appeared in an introductory section of the Senate Report that discussed past FOIA bills; it did not appear in the portion of the Report explaining Exemption 5, or indeed in any portion of the Report discussing the substantive provisions of FOIA. The last paragraph of the introductory

section of the Senate Report, entitled "History of Legislation," reads:

"In the last Congress, the Senate passed S.1666, upon which this bill [S.1160] is based, on July 31, 1964, but sufficient time did not remain in that Congress for its full consideration by the House. The present bill is substantially S.1666, as passed by the Senate, with amendments reflecting suggestions made to the committee in the course of the hearings." Senate Report 4.

This cryptic comment can hardly support the notion that Congress intended, through the use of only a general introductory statement not dealing with Exemption 5 or any substantive portion of the bill, to change the force of extensively developed legislative history and make purely factual, investigative witness statements exempt from disclosure by Exemption 5. See Department of State v. Washington Post Co., 456 U.S. 595, 600 (1982) ("[p]assing references and

isolated phrases are not controlling when analyzing a legislative history"). Fairly read, this general introductory language means only that the revised version of the Senate bill reflected certain suggestions made in the course of the Hearings. Obviously the amended Senate bill reflected some suggestions; as noted above, the reason for the change in the language of Exemption 5 was the concern voiced during the Hearings that otherwise-exempt material would have to be released merely because it did not deal "solely" with law and policy. To read this language, as Petitioner urges, to mean that each and every suggestion made to the Senate Committee during the course of the Hearings may "reasonably be inferred" to be incorporated in FOIA is at war with the specificity with which Congress drafted the statute, with the

expressed Congressional intent that FOIA's Exemptions be narrowly construed, and with Congress' desire that there be concrete "workable standards" for the sound administration of the Act. Such a construction is no less objectionable than the construction, rejected by this Court in Mink, that the change in Exemption 5's language should be read as providing that all factual material is exempt from disclosure. Mink, supra, 410 U.S. at 91.

b. The flaws of Petitioner's position are further evident when some of the "suggestions" made in the Hearings are recounted. The recurring theme among the Executive departments and agencies was opposition to FOIA.<sup>4/</sup> For example, the

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<sup>4/</sup> Indeed, Congress noted that, even after the Hearings and "a carefully prepared report -- which clarifies legislative intent . . . [t]here still remains some opposition on the part of a  
(footnote continued)

Interstate Commerce Commission urged that "all internal memorandums be withheld from disclosure." Senate Hearings 244. The Federal Communications Commission urged that Exemption 5 should include all inter-agency or intra-agency memorandums or letters that did not fall "within one of the categories of agency records required to be published or disclosed by some other provision of this Act." Id. at 459. Indeed, Assistant Attorney General Norbert A. Schlei, who was the principal spokesman for the Executive Branch and whose testimony is relied upon by Petitioner (Pet. Br. 27-28), did not limit his comments to the so-called "Machin privilege" for witness statements

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(footnote continued from previous page)  
few Government administrators . . . ." 112 Cong. Rec. 13653 (1966) (remarks of Rep. Rumsfeld). This continued opposition, of course, is a further refutation of Petitioner's argument that all "suggestions" made at the Hearings were heeded by Congress.

taken in military air crash safety investigations, but urged the existence of a broad privilege "in any case where disclosure would hamper an important governmental function." House Hearings 220. It could not seriously be contended that any of these suggestions became the law. That a "privilege" to protect witness statements was mentioned during the Hearings similarly cannot, ipso facto, serve to incorporate that privilege into Exemption 5.

c. Further illustrating the weakness in Petitioner's argument that Exemption 5 should be extended by implication (or Congressional silence) is the fact that the references in the Hearings to witness statements such as those at bar do not appear in Exemption 5 contexts at all. Most of the references cited by Petitioner were made in the course of

criticizing the Senate's formulation of Exemption 7.5/ See Senate Hearings 417-418 and House Hearings 220 (Department of Defense); Senate Hearings 206 (Assistant Attorney General Schlei); Senate Hearings 366-367 and House Hearings 237 (Civil Aeronautics Board). Other references do not mention any Exemption at all. See Senate Hearings 418 (Department of Defense); Senate Hearings 196 (Assistant Attorney General Schlei). A number of the comments that Petitioner cites do not even specifically mention witness statements made in the course of air

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5/ Exemption 7 clearly does not apply to the witness statements at bar, since the statements were not taken for law enforcement purposes, but rather were taken as part of an investigation the "sole purpose" of which "is to determine the cause of the accident and to develop corrective measures to prevent similar mishaps in the future" (Pet. Br. 3). See FBI v. Abramson, 456 U.S. 615, 622 (1982); Church of Scientology v. Dep't of Army, 611 F.2d 738, 748 (9th Cir. 1980). Petitioner acknowledges as much (Pet. Br. 30).



crash accident investigations. See, e.g., Senate Hearings 206 (Assistant Attorney General Schlei). In short, none of the comments cited by Petitioner fairly supports the notion that Congress intended witness statements of the type involved in this case to be covered by Exemption 5.

**D. Under The Case Law As  
Of The Enactment Of FOIA,  
The Witness Statements At  
Bar Were Subject To Dis-  
covery.**

Petitioner's strained view of the legislative history is further demonstrated by the pertinent case law as of the enactment of FOIA in 1966. We have found no reported decision as of the passage of FOIA that would have shielded the witness statements at bar from discovery. It is simply illogical to imply a Congressional intendment that

these statements be embraced by Exemption 5, when all judicial authority available to Congress would not have viewed these statements as "not routinely available" in litigation. Simply put, as of the passage of FOIA, these statements were available to litigants, and "[w]e must assume . . . that Congress legislated against the backdrop of this case law." Mink, supra, 410 U.S. at 89.

1. The Reynolds Case.

A typical example of the generally recognized rejection of privilege before FOIA is found in the landmark case of Reynolds v. United States, 10 F.R.D. 468 (E.D. Pa. 1950), aff'd, 192 F.2d 987 (3d Cir. 1951), rev'd on other grounds, 345 U.S. 1 (1953). Reynolds was a Federal Tort Claims Act suit seeking recovery of damages arising from the crash of a

military aircraft. Judge Kirkpatrick ordered that the report and findings of the military investigation board and witness statements given by military personnel to the board must be produced. He specifically rejected the claim of privilege that Petitioner urges here:

"In effect, the Government claims a new kind of privilege. Its position is that the proceedings of boards of investigation of the armed services should be privileged in order to allow the free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper discipline. I can find no recognition in the law of the existence of such a privilege. 10 F.R.D. at 472 (emphasis added).

The Third Circuit affirmed this ruling and held "that the district court rightly rejected the broad claim of privilege made by the United States not to produce any statements or reports regarding

airplane accidents." 192 F.2d at 998. Writing for that Court, Judge Maris eloquently explained why the Government's interest in shielding this material must yield to a free society's paramount interest in freedom of information. Id. at 994-995. And he further noted:

"It may well be more convenient and efficient in the conduct of accident investigations for the [Air Force] Department not to be required to disclose statements and reports of this character. But the same would be true in the case of any private person and the latter do not ordinarily enjoy that privilege." Id. at 994.

This Court reversed the judgment of the Court of Appeals in Reynolds. The Court did not, however, review this ground relied upon by the Court of Appeals, but expressly decided only the alternative, "narrower ground" that discovery should not proceed because of the presence of military and state secrets.

United States v. Reynolds, 345 U.S. 1, 6-7, 10-11 (1953). The District Court's and Court of Appeals' analysis rejecting the privilege asserted by Petitioner herein was left untouched. Indeed, to the extent any Justice considered that analysis, it met with approval, since Justices Black, Frankfurter, and Jackson dissented in Reynolds "substantially for the reasons set forth in the opinion of Judge Maris below." 345 U.S. at 12.

## 2. Other Pre-FOIA Cases.

Reynolds was but one of several pre-FOIA cases ordering the disclosure of reports and witness statements generated in the course of military safety investigations of military aircraft accidents. In Cresmer v. United States, 9 F.R.D. 203, 204 (E.D.N.Y. 1949), the Court gave the following reason for

rejecting the assertion of "privilege" and ordering the disclosure of a Report of a Navy Board of Investigation:

"In the absence of a showing of a war secret, or secret in respect to munitions of war, or any secret appliance used by the armed forces, or any threat to the National security, it would appear to be unseemly for the Government to thwart the efforts of a plaintiff in a case such as this to learn as much as possible concerning the cause of the disaster" (emphasis added).

See also United Air Lines, Inc. v. United States, 186 F. Supp. 824 (D. Del. 1960), later opinion, 26 F.R.D. 213 (D. Del. 1960) (statements of fact witnesses); O'Keefe v. Boeing Co., 38 F.R.D. 329, 334-335 (S.D.N.Y. 1965) (records of facts, including witness statements, made in air crash safety investigation).

3. Petitioner's Reliance  
Upon Machin v. Zuckert  
Is Misplaced.

Petitioner relies upon Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963), as the case that assertedly served as the basis for Congress' implicit recognition that witness statements like the ones at bar fall within Exemption 5. Machin did not extend a privilege, however, to statements -- such as those involved here -- taken from witnesses who are military personnel. The Machin court expressly declined to shield from disclosure such statements, and limited protection to the "testimony of private parties" and to such portions of the investigative report "reflecting Air Force deliberations or recommendations as to policies that should be pursued." 316 F.2d at 339-341. Machin can hardly serve as the implicit predicate for Peti-



tioner's assertion that, in passing FOIA, Congress gave recognition that witness statements of military personnel were not routinely available. No court -- not even the Machin court -- had yet extended the privilege that far. Congress, which obviously did not even discuss the so-called "Machin privilege" in its Reports or debates, should not be held to have done so silently.

II. THIS COURT SHOULD NOT ADOPT A  
SPECIAL PRIVILEGE FOR THESE  
WITNESS STATEMENTS TO EXEMPT THEM  
FROM FOIA.

As discussed above, the Court below correctly held that the asserted privilege which Petitioner asks this Court to recognize was not within the contemplation of Congress when it enacted FOIA. Petitioner argues in the alternative, however, that the asserted privilege is today "clearly recognized" and the

language of Exemption 5 is broad enough to include it. Petitioner fares no better on this point.

At the outset, for the Court to accept Petitioner's argument it must accept, on the merits, that there should be a special privilege extended for witness statements, concededly not taken in anticipation of litigation but in connection with military air crash safety investigations. See FTC v. Grolier, Inc., 462 U.S. \_\_\_, 103 S.Ct. 2209, 2214 (1983); id., 103 S.Ct. at 2218 (Brennan and Blackmun, JJ., concurring in part and concurring in the judgment). The existence vel non of this privilege was not passed upon by either Court below. Not only does this Court not have the benefit of decisions below, but also the Record is not properly developed to decide whether, or to what extent, these witness

statements should be shielded from civil discovery. In the circumstances, "[t]hat determination must await the development of a proper record," and a remand to the District Court for that purpose is appropriate. See, e.g., Federal Open Market Committee v. Merrill, 443 U.S. 340, 364 (1979).

A. Purely Factual Witness Statements Not Taken In Anticipation Of Litigation Are Generally Subject To Disclosure.

Generally, witness statements not taken in anticipation of litigation are required to be produced in discovery. E.g., Mercy v. County of Suffolk, 93 F.R.D. 520 (E.D.N.Y. 1982); Janicker v. George Washington University, 94 F.R.D. 648 (D.D.C. 1982); Miles v. Bell Helicopter Co., 385 F. Supp. 1029 (N.D.Ga. 1974) (accident reports made by employees

of airplane manufacturer); Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D.Ill. 1972); Whitaker v. Davis, 45 F.R.D. 270 (W.D.Mo. 1968); 4 Moore's Federal Practice ¶ 26.64[2], at 26-414 to 26-415 & nn. 2-4 (2d ed. 1983). Even when such statements have been taken as part of Governmental investigations, they have routinely been available to parties in litigation. E.g., Roval Exchange Assur. v. McGrath, 13 F.R.D. 150 (S.D.N.Y. 1952); Wunderly v. United States, 8 F.R.D. 356 (E.D.Pa. 1948); see also Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708 (E.D.Pa. 1968). And witness statements have, moreover, been held not to fall within Exemption 5 of FOIA. E.g., Charlotte-Macklenburg Hospital Authority v. Perry, 571 F.2d 195, 198 n. 5 (4th Cir. 1978); Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724,

734-737 (5th Cir. 1977), rev'd on other grounds, 437 U.S. 214 (1978); see also NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 254 n.12 (1978) (Powell, with Brennan, JJ., concurring in part and dissenting in part).6/ There is no

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6/ "In light of my view of the limits of Exemption 7 (A), I reach the Board's alternative argument that the witness affidavits in dispute are protected against disclosure by Exemption 5. . . . I agree generally with the analysis of the Court of Appeals that the purpose of this Exemption is to protect agency litigation strategy and decisionmaking processes, and not to incorporate fully the 'work product' privilege recognized in Hickman v. Taylor, 329 U.S. 495 (1947), and Fed. Rule Civ. Proc. 26(b)(3). Our decision in NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154-155, 159-160 (1975), provides support for this view. In this case, by contrast, the Board does not suggest that the witness affidavits in question are anything other than verbatim transcripts of statements made by witnesses to Board personnel."

The witness statements at bar were not even taken in anticipation of litigation,  
(footnote continued)

greater public interest serving to shield the witness statements at bar than the interests served by those statements normally and routinely released. Indeed, the public's interests in ensuring that the Nation's military aircraft operate with maximum safety, that our military commanders responsibly discharge their responsibilities to promote safety and investigate the causes of mishaps, that our military personnel are properly trained and combat ready, and that the military services and its private contractors furnish the highest quality equipment, at reasonable cost, for our personnel, all commend the release of the statements to the public.

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as were the statements in Robbins Tire & Rubber Co., and thus are not "work product" of any kind.

- B. The National Transportation Safety Board, Which For Civil Aviation Has Responsibilities Identical To Military Air Crash Safety Investigation Boards, Routinely Makes Available To The Public Witness Statements Taken In Its Investigations Of Civil Air Crashes.

The practice of the National Transportation Safety Board ("NTSB"), which is charged by law with investigating and determining the causes of civil air crashes, makes clear that there is absolutely no need to shield witness statements like the ones at bar from disclosure.

Congress established the NTSB in 1966 as a part of the Department of Transportation. 49 U.S.C. § 1901; see Public Law 89-670, 80 Stat. 935 (1966). In 1975, Congress found that the functions of NTSB, including those involving criticism of other agencies, could not be



properly performed unless the NTSB was totally separate and independent, and so it removed the NTSB from the Department of Transportation and made it an independent agency. 49 U.S.C. §§ 1901, 1902(a); see 49 C.F.R. § 800.2; see also S. Rep. No. 93-1347, 93d Cong., 2d Sess. 31, 1974 U.S. Code Cong. & Ad. News 7669, 7694.

The NTSB's mission is "to promote transportation safety by conducting independent accident investigations and by formulating safety improvement recommendations." 49 U.S.C. § 1901(1); 49 C.F.R. § 800.3(a). It is responsible for investigating and determining the facts, conditions, circumstances and the cause or probable cause of various specified types of accidents, including all accidents involving civil aircraft, and for developing measures designed to ensure

the safety of all modes of transportation, including air travel. See 49 U.S.C. § 1903(a); 49 C.F.R. § 800.3.

The statutory and regulatory scheme demonstrate that neither Congress nor the NTSB perceives a need to conduct aircraft accident investigations in secret. On the contrary, the public benefits from being deliberately made aware of the NTSB's work. As Senator Hartke, the sponsor of the bill establishing the NTSB as an independent agency, stated:

"The great power that they [NTSB] have is that their information is transmitted to Congress and, therefore, it becomes a matter of consideration. Their information is transmitted to the public, which is certainly ultimately very vitally concerned, and will become more concerned." 120 Cong. Rec. 34081 (1974) (remarks of Sen. Hartke).

The NTSB's hearings are generally open to the public, with witnesses giving their testimony in the open. See 49

C.F.R. § 845.3. 49 U.S.C. § 1903(a)(2)

requires the Board to:

"report in writing on the facts, conditions, and circumstances of each accident investigated . . . and cause such reports to be made available to the public at reasonable cost and to cause notice of the issuance and availability of such reports to be published in the Federal Register."

See also 49 C.F.R. §§ 801.35, 845.40.

The NTSB's enabling legislation also requires it to make public all information it receives, with two exceptions not pertinent here, except to the extent such information is exempted from FOIA by 5 U.S.C. § 552(b), or is otherwise protected by law from disclosure to the public. 49 U.S.C. § 1905. As a matter of practice, the NTSB normally and routinely makes public its reports and its accident files, including witness statements. Its regulations state that

"it is the policy of the Board to make information available to the public to the greatest extent possible." 49 C.F.R. § 801.2; see also 49 C.F.R. § 801.10 and the Appendix to 49 C.F.R. Part 801. According to its regulations, the NTSB thus regards the release of these witness statements not to be inconsistent with the purposes of Exemption 5. See 49 C.F.R. § 801.50; see also 49 C.F.R. § 801.54(b).

The NTSB has been highly effective in achieving the goal of promoting safety in civil air travel. For the period from 1974 through 1979, the civilian accident rate per 100,000 aircraft hours flown for all civilian aircraft (including scheduled air carriers, general aviation, and unscheduled carriers) dropped from 0.77 to 0.40, a decrease of almost one-half (Appendix ("App.") infra, at 1a). For

the same period, the Air Force accident rate per 100,000 hours flown actually increased from 2.90 to 2.92. Id. Thus, the Air Force accident rate per 100,000 hours flown increased from 3.8 times the civilian rate in 1974 (2.90 v. 0.77), to 7.3 times the civilian rate in 1979 (2.92 v. 0.40).<sup>7/</sup>

When Air Force accident rates are compared with domestic scheduled airline accident rates (exclusive of general aviation and unscheduled carriers), the results are even more dramatic. The

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<sup>7/</sup> It is difficult to obtain from publicly available sources comprehensive information about Air Force accident rates. Unlike the NTSB, which makes annual reports to the Congress, and which routinely publishes comprehensive information about accident rates, the Air Force publishes scant little information about its own accident rates.

The information reflected in the text above is based upon NTSB publications and the Air Force Inspector General's Listing of Class A Aircraft Mishaps per 100,000 flight hours for the years 1974 to September 1983.

accident rate per 100,000 hours flown for scheduled airlines decreased from 0.57 in 1975 to 0.23 in 1982. The Air Force accident rate per 100,000 hours flown was 2.80 in 1975, and 2.30 in 1982. Thus the Air Force accident rate per 100,000 hours flown was approximately 4.9 times higher than the scheduled airline rate in 1972 (2.80 v. 0.57), and a full 10 times higher than the scheduled airline rate in 1982 (2.30 v. 0.23). (App. 2a.)

The interests served by the NTSB are as compelling, if not more compelling, than the interests served by investigations into the causes of military air crashes. See FAA v. Robertson, 422 U.S. 255, 266-267 (1975). The NTSB has well served the public and these interests and has done so while making its work available for public scrutiny. Its record clearly demonstrates that the NTSB's

policy of releasing witness statements has in no way prevented the NTSB from greatly improving the safety record for civil air travel. There is no basis for Petitioner's speculative claim that the withholding of witness statements is necessary to promote the safety of military travel.

C. **The Alleged Promise Of Confidentiality Extended To These Air Force Witnesses Does Not Confer Any Privilege Upon The Witness Statements Or Exempt Them From Disclosure Under FOIA.**

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Petitioner argues that these witness statements were received upon a promise of confidentiality. Such an alleged promise, however, is no justification for the special privilege Petitioner seeks.

Promises of confidentiality "cannot, in and of themselves, override [FOIA]." Robles v. EPA, 484 F.2d 843, 846 (4th



Cir. 1973); accord, e.g., Petkas v. Staats, 501 F.2d 887 (D.C. Cir. 1974). In any event, there is no evidence in this Record that the witnesses were given any specific promises of confidentiality, at any specified time, by any specified person, under any specified circumstances. The Record does not reflect where, when, by whom, to whom, or in what words such an alleged promise was made. The Record merely contains a broad statement that it is general Air Force policy to promise confidentiality (Pet. Br. 7), but this generalized policy simply does not speak to whether specific promises of confidentiality were made to the witnesses whose statements are involved herein. Petitioner's failure to document any specific promises of confidentiality is not insignificant, since this is a FOIA case where the matter is heard de novo, and "the burden

is on the agency to sustain its action."  
5 U.S.C. § 552 (a)(4)(B).

Further, the Air Force could not, consistently with its regulations, make a blanket promise of confidentiality to any potential accident board witness. The Air Force Regulations require that witness statements be released in certain circumstances (see AFR 127-4, ¶ 2-5.d. (Pet. Br. 3a)); the Regulations even provide that "factual parts" of safety investigation reports (including witness statements that are attached) "must be released . . . [a]s required by the Freedom of Information Act" (AFR 127-4, ¶ 2-5.d. (Pet. Br. 3a)). AFR 127-4, ¶ 2-5.d.(3) (Pet. Br. 3a) requires that any person who is court martialed be furnished with all statements, sworn or unsworn, given to Federal agents, by any witness who testifies against the

accused. And AFR 127-4, ¶¶ 5-4.d. and 2-10.a.(2)(a) (App., infra, 3a-4a) provide that if the accident report names an Air Force employee as responsible for causing the accident, that person must be given the opportunity to review the entire accident report and submit a rebuttal statement. Thus the most that an Air Force employee could promise a potential witness, consistent with AFR 127-4, is that the witness's statement will be kept confidential, except as it may be required to be released, including by operation of FOIA. Such a "Catch-22" promise of confidentiality is no promise at all.

**D. Accordingly, These Witness Statements Should Not Be Afforded A Special Exemption From Disclosure.**

In view of the general rules and policies favoring disclosure, and the

lack of any distinguishing, practical reason for nondisclosure, the cases holding that these witness statements are not entitled to a special protection from disclosure represent the better view of the law. See cases cited supra at 34-38; see also McFadden v. Avco Corp., 278 F. Supp. 57, 60 (M.D.Ala. 1967). Witness statements such as those at bar normally are given at or near the time the crashes occur, and the public, the courts, and litigants -- no less than the military -- are entitled to accurate information on the causes of these incidents.

E. At The Very Least, The Law Commends Not Adopting Such A Privilege, Having Such Far-Reaching Consequences, Except Upon A Full Record That Is Absent Here.

The Machin privilege rests entirely upon a factual hypothesis: unless the

Air Force is able to promise witnesses confidentiality, it will fail to obtain important information about the causes of accidents, and will be unable to take appropriate corrective measures to prevent recurrence. Cooper v. Navy, 558 F.2d 274, 277 (5th Cir. 1977), on petition for rehearing, 594 F.2d 484 (5th Cir.), cert. denied, 444 U.S. 926 (1979); Brockway v. Dep't of Air Force, 518 F.2d 1184, 1191 (8th Cir. 1975); Machin, supra, 316 F.2d at 339. If that factual hypothesis is unsound, there would be no basis for the privilege.

The Court of Appeals expressly assumed the existence of a "Machin privilege" and held that, nonetheless, it was not subsumed within Exemption 5. 688 F.2d at 642. It did not decide whether or not the Machin privilege should be recognized in the Ninth Circuit, and there has been

no Record developed with respect to the putative basis for such a privilege. There has been no judicial scrutiny in this case as to whether the asserted grounds for the privilege in fact are justified.

This Court should not approve the Machin privilege without the benefit of an adequate Record. Many questions remain unanswered, and there is a need for full development of the facts. Does the Air Force in fact routinely advise witnesses before they are interviewed that their statements will not be used for any purpose except accident prevention? What is the specific text of the promise allegedly made? Does the Air Force advise witnesses of the provisions of its Regulations requiring disclosure of witness statements when persons testify at court martials, when mandated

by FOIA, or to military personnel named as having caused an accident? To whom are these witness statements disseminated?<sup>8/</sup> How important are such witnesses to Air Force investigations? (Much direct physical evidence, such as flight data recorders and cockpit voice recorders, is usually available to military investigators; witness accounts may not be as precise and may be less valuable to the military than Petitioner contends.) Would the information be

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<sup>8/</sup> In Cooper, supra, 594 F.2d at 488-489 n.2, the Court of Appeals required the District Court to conduct a hearing with respect to the Navy's assertion of a privilege preventing the disclosure of a report of a Navy safety investigation into a helicopter crash. After the hearing, the Court found a limited waiver of the privilege because of the dissemination of the report beyond the Navy, in violation of the Navy's regulations. See also O'Keefe v. Boeing Co., 38 F.R.D. 329 (S.D.N.Y. 1966) (production allowed on alternative ground of waiver of alleged privilege, based upon disclosure of accident report to Boeing, the Government's prime contractor).



obtainable from witnesses absent any promise? (For example, when, as in this case, the witnesses are also members of the military, they may in certain circumstances be required to answer questions about their official duties, and discharged if they fail to do so. See, e.g., Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968)). Does the Air Force act promptly to implement the recommendations for corrective action contained in its accident reports? A Court asked to approve the Machin privilege is entitled to know whether the Air Force regularly implements, or disregards, those corrective action

recommendations for which these witness statements ostensibly are obtained.<sup>9/</sup>

The conclusory assertions in the Affidavits in this case have not been tested. Should this Court disagree with our positions that Congress did not intend purely factual material such as these witness statements to be exempt from FOIA under Exemption 5, or that the better view of the law is that no special privilege should be extended to these particular witness statements, there

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<sup>9/</sup> The only issue presented to this Court involves the availability of witness statements; the availability to the public of other sections of the Air Force's formal accident report, such as the recommendations section, is not at issue here. Whether Exemption 5 extends to such other sections of the accident report presents additional legal issues that have not been briefed by the parties. See, e.g., 49 U.S.C. § 1906. Even if the content of such recommendations may not be disclosed, however, no reason appears why the Air Force's record of implementing or disregarding recommendations may not be examined through, for example, the use of statistical information.

should nonetheless be a full exploration in the District Court of the basis for the asserted "privilege," before this Court considers Petitioner's request for a special exemption from discovery.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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## APPENDIX

ACCIDENT RATES PER 100,000  
AIRCRAFT-HOURS FLOWN

<u>Year</u>	<u>U.S. Certificated Route and Supplemental Air Carriers (All Operations)</u>	<u>Air Force Class A Mishaps<sup>1</sup></u>
1974	0.77 <sup>2</sup>	2.9
1975	0.67 <sup>2</sup>	2.8
1976	0.43 <sup>3</sup>	2.8
1977	0.36 <sup>3</sup>	2.78
1978	0.35 <sup>3</sup>	3.16
1979	0.40 <sup>3</sup>	2.92

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<sup>1</sup> Taken from Air Force Inspector General Listing of Class A Mishaps from 1974 to September 1983. "Class A" mishaps are those resulting in (1) a total cost of \$200,000 or more for injury, occupational illness, and property damages, or (2) a fatality, or (3) destruction of, or damage beyond economical repair to, an Air Force aircraft. AFR 127-4, ¶ 1-4a.

<sup>2</sup> Taken from 1976 NTSB Annual Report to Congress.

<sup>3</sup> Taken from 1979 NTSB Annual Report to Congress.

ACCIDENT RATES PER 100,000  
AIRCRAFT-HOURS FLOWN

<u>Year</u>	<u>U.S. Air Carriers Operating Under 14 C.F.R. 121 All Scheduled Service, (Air Lines) <sup>1</sup></u>	<u>Air Force Class A Mishaps <sup>2</sup></u>
1975	0.57	2.8
1976	0.39	2.8
1977	0.36	2.78
1978	0.35	3.16
1979	0.36	2.92
1980	0.22	2.73
1981	0.38	2.44
1982	0.23	2.3

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<sup>1</sup> Taken from attachments to NTSB Release No. SB-83-1, dated January 7, 1983.

<sup>2</sup> Taken from Air Force Inspector General Listing of Class A Mishaps from 1974 to September 1983.

Air Force Regulation 127-4 (Jan. 18, 1980) provides in pertinent part:

**2.10. Notifying Persons Found Responsible for an Aircraft, Missile, or Nuclear Mishap.** Use the following procedures for formal reports:

a. **Military and Civilian Personnel Under Air Force Jurisdiction.** When an Air Force person is named as a cause of one of these mishaps, he or she should have a chance to correct the record. This applies to the formal report, an indorsement by a reviewing commander, and the AF/IGD letter of final evaluation. Ask the involved individual to submit a statement of rebuttal or a statement declining rebuttal. (See attachment 4 for a suggested format.) The person must be advised that paragraph 3-8d applies to the statement of rebuttal and that the statement becomes an attachment to the mishap report. If the person found responsible is:

\* \* \*

(2) Attached or assigned to another major command, the investigator(s) sends a copy of the report to the person's immediate commander. Attach a letter asking that commander to:

(a) Notify and give the person a chance to review the report.

\* \* \*

**5-4. Who Reviews the Formal Report.** Mishap causes may require corrective actions by a number of organizations, both within and external to the chain of command. Therefore, the report is reviewed by the following:



\*

\*

\*

d. Each person who has been named responsible for an aircraft, missile, or nuclear mishap. (See paragraph 2-10 for rebuttal procedures.)

FILED

OCT 10 1983

ALEXANDER L. STEVENS,  
CLERK

No. 82-1616

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

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UNITED STATES OF AMERICA,  
*Petitioner,*

v.

WEBER AIRCRAFT CORPORATION, et al.,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF OF THE REPORTERS COMMITTEE FOR  
FREEDOM OF THE PRESS, et al.  
AS AMICI CURIAE**

---

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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No. 82-1616

UNITED STATES OF AMERICA, Petitioner

v.

WEBER AIRCRAFT CORPORATION, et al.,

Respondent

---

On Writ of Certiorari to the United  
States Court of Appeals for the  
Ninth Circuit

---

Brief of the Reporters Committee for  
Freedom of the Press, Freedom of  
Information Service Center, Texas Daily  
Newspaper Association,  
as Amici Curiae.

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## INTEREST OF THE AMICI CURIAE<sup>1</sup>

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media. The Committee, founded in 1970, is operated by a Steering Committee of 30 news reporters from around the country. Its legal defense and research efforts are devoted to the protection of the First Amendment and freedom of information interests of the press.

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<sup>1</sup> The parties' letters of consent to the filing of this brief are being lodged with the Clerk pursuant to Rule 36.1.

Counsel wishes to acknowledge the important contributions made to this brief by four present and former students of the University of Maryland School of Law: Deborah Baer, Miriam Fisher, Shelley Latin and Glenn Solomon.

The Reporters Committee has provided representation, information, legal guidance or research in virtually every major press freedoms case that has been litigated since 1970, including Branzburg v. Hayes, 408 U.S. 665 (1972); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Gannett Co. v. DePasquale, 443 U.S. 368 (1979); Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980); and Reporters Committee for Freedom of the Press v. Kissinger, 445 U.S. 136 (1980).

Together with the Society of Professional Journalists, Sigma Delta Chi, the Reporters Committee sponsors the FREEDOM OF INFORMATION SERVICE CENTER. The Center provides legal assistance

annually to over 1,000 journalists, reporters, and authors who are using the Freedom of Information Act and other access laws in the course of their newsgathering. The Center has previously appeared as amicus in several major FOIA cases, including Playboy v. Department of Justice, 516 F. Supp. 233 (D.D.C. 1981), aff'd in part, rev'd in part, 667 F.2d 931 (D.C. Cir. 1982); and Bureau of National Affairs, Inc. v. Department of Justice, No. 83-1138 (D.C. Cir. 1983).

The Center, as the primary legal resource of journalists seeking access to government information, is concerned with upholding the spirit and purpose of the FOIA as it was envisioned by Congress when it enacted the law. The Center believes it can provide the Court with special insight into the importance of

military aircraft safety investigation reports to both the public and the press.

The TEXAS DAILY NEWSPAPER ASSOCIATION was founded in 1921 to act as an advocate for reporters, editors and newspaper publishers. Its membership of ninety-six newspapers represents ninety-seven percent of the total daily newspaper circulation in Texas. Included among its members are also newspapers in Clovis, New Mexico, Lawton, Oklahoma, and Alexandria, Monroe and Shreveport, Louisiana.

The association has a long history of involvement in legal efforts to protect and expand freedom of the press on both the state and national levels. Those efforts include filing numerous amicus curiae briefs in Open Meetings and

Open Records Act cases and supporting the efforts of the American Newspaper Publishers Association and the Reporters Committee for Freedom of the Press on a variety of press issues. Among the cases in which the association has participated are Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App. 1975), and In re Bruce Selcraig, 705 F.2d 789 (5th Cir. 1982).

In July of this year, the association was one of the leaders in the effort to strike from S. 675 a section which would have severely restricted the release of information on military aircraft accidents. Because of the association's continued interest in maintaining the disclosure of these documents and preserving the concept of

open government, we join this brief as  
amicus curiae.

The Reporters Committee, the FOI Service Center and the Texas Daily Newspaper Association join together to seek an affirmance of the holding of the Court of Appeals holding that a privilege for witness statements relating to military aircraft accidents should not be incorporated into Exemption 5 of the Freedom of Information Act to withhold information from the public.



## **SUMMARY OF ARGUMENT**

The case before the Court is of great importance to the public and the press because it raises the question of whether the military is accountable to the public for aircraft accidents which injure or kill American service persons. If the government prevails, virtually no information of any factual or decisional consequence will be made public under Freedom of Information Act. The government would be permitted to withhold the Air Safety Investigation, containing statements of military and aircraft equipment manufacturer witnesses. These statements can show what type of defects were in the airplane; whether poor training or drug-related problems may have caused the mishap; what conclusions

the investigation reached as to the causes of the accident and how to prevent similar accidents in the future.

The position of the Amici Curiae is that the Court of Appeals correctly ordered the disclosure of factual statements by military personnel. Further, we believe that it is appropriate to disclose the opinions of the witnesses because they will add to the public's understanding of why the crash occurred. Of equal importance to the public, we believe, is access to statements given by aircraft equipment manufacturer witnesses.

Our military aircraft program is not only extremely expensive, it is also of critical importance to our self-defense. Prompt disclosure of detailed information about all aspects of the program is

necessary if the public is to exercise its responsibilities in this democracy. The government's basic argument, that confidentiality is required to ensure the cooperation of witnesses, contradicts the fundamental principle of government accountability to the public. Any government agency can argue that it is easier to obtain self-critical information if the criticism remains secret. As reporters, editors and publishers, however, we are dedicated to the proposition that public knowledge is the best way -- in the long run -- to assure that the government corrects problems rather than covering them up. In enacting the Freedom of Information Act, Congress reaffirmed the principle that disclosure -- and not secrecy -- is the more fundamental policy.

The argument of the United States in this case rests on the assumption that the "Machin privilege" covers the requested materials, the statements given in a safety investigation by two members of the Air Force: Captain Hoover, the injured pilot, and an airman who helped to rig the ejection equipment. (Pet. App. 2a-3a.) Based on this assumption, the government then argues that under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), the statements are exempt from mandatory release because they are privileged in civil discovery. The amici curiae do not agree with the Machin court that any portion of an aircraft safety report need be privileged per se. As will be shown below, further, the Machin privilege does not cover statements given safety

investigators by members of the Air Force. It is neither consistent with the decisions of this Court nor in the interest of the public to enlarge the Machin privilege to provide for such coverage. In addition, even if the Machin privilege were enlarged, the Amici Curiae urge this Court not to expand upon its current interpretation of Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), to include within the scope of the exemption new civil discovery privileges such as the Machin privilege.

## ARGUMENT

IT IS NEITHER CONSISTENT WITH  
THE DECISIONS OF THIS COURT NOR  
IN THE PUBLIC INTEREST TO ENLARGE  
THE "MACHIN PRIVILEGE" TO COVER  
THE REQUESTED MATERIALS

The argument of the United States in this case rests on the assumption that the "Machin privilege" covers the requested materials, statements given in a safety investigation by two members of the Air Force: Captain Hoover, the injured pilot, and an airman who helped to rig the ejection equipment. (Pet. App. 2a-3a.) Based on this assumption, the government then argues that under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), the statements are exempt from mandatory release because they are privileged in civil discovery.

As will be shown below, however, the Machin privilege does not cover statements given safety investigators by members of the Air Force, and it is neither consistent with the decisions of this Court nor in the public interest to enlarge the Machin privilege to provide for such coverage.

In Machin v. Zuchert, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963), the appellant, the sole surviving member of an Air Force aircraft crash, sought the disclosure of the entire Aircraft Investigation Report. The court held privileged testimony of private parties, conclusions based on such privileged information, and material reflecting Air Force deliberations or recommendations. 316 F.2d at 339. The factual findings of Air Force mechanics



who examined the wreckage, on the other hand, was found not to be privileged. 316 F.2d at 340. Thus, contrary to the Government's assertions about Machin, information similar to the requested materials in this case, that is, information provided by Air Force personnel, was not found to be privileged.

Other courts consistently have followed the lead of Machin in distinguishing between information provided in safety investigations by armed services personnel and information provided by private parties. The former has been released, while the latter has been withheld. See Moore-McCormack Lines v. I.T.O. Corporation of Baltimore, 508 F.2d 945, 948 (4th Cir. 1974); McFadden v. Avco, 278 F. Supp. 57 (M.D. Ala.

1967); O'Keefe v. Boeing Co., 38 F.R.D. 329 (S.D.N.Y. 1965).

It is sound public policy to sustain the Machin court's decision that information provided by armed services personnel should be released. Since 1979, 327 Air Force planes have crashed, and 470 people have died. Military Wants Crash Data Kept Secret, The Boston Globe, Aug. 1, 1983, Sec. A, p.1, col.1. Despite petitioner's assertion that the safety record of the Air Force is improving, Brief for Petitioner at 4 n.6, in the first four months of 1983, there were ten planes lost and eleven fatalities. Projections based on these figures suggest that the total number of accidents will be higher this year than in prior years. Flight Safety Best Yet in '82; '83 Off to a Bad Start, Air Force

Times, May 9, 1983, p.7, col.1. While the public may speculate on the causes of these accidents, the true reasons are withheld from public scrutiny, because the military insists on the confidentiality of interviews of its personnel conducted in the course of its safety investigations. Access to these reports is crucial for public understanding because, as the Air Force regulations state, these witnesses frequently provide vital information that leads to the discovery of the cause of a crash and the implementation of life-saving corrective action. A.F. Reg. 127-4, para. 3-8(d) (Appendix to Brief for Petitioner, pp. 3a-4a.)

According to reporters experienced in covering military affairs, the accident safety investigation reports

represent the most complete, accurate and impartial analysis of the causes of an aircraft accident, and the need for technical and personnel improvements. See Affidavit of David A. Browde, Appendix A; Affidavit of Fred Kaplan, Appendix B. When such reports are kept confidential, the public cannot ensure that proper corrective actions are taken. Id., Appendix A at paras. 8-11; Appendix B at paras. 7-10. Instead, the public and the Congress must rely on the armed forces to determine - without the review usual to the democratic process - what changes are required to avoid the reoccurrence of the tragedy.

Unfortunately, the confidential and unreviewable process of the military does not result in proper safety improvements being made in every case. In 1978, for

example, Congressman Les Aspin charged the Navy with a systematic coverup of its difficulties in repairing catapult and arresting-gear systems on aircraft carriers. Appendix B, paras. 3-7 and attachment. Aspin stated that in 1970 the Naval Air Test Facility had pointed out the problems in two detailed reports. Although the recommended solutions could have been implemented for less than \$100,000.00, no action was taken to remedy the situation. As the result of the Navy's omission, which Aspin characterized as "gross negligence," at least seven planes crashed and four people died in 1978 alone. Id.

From 1970 to 1978, and continuing to this day, the Navy, along with the other branches of the military, consistently have cited "executive

privilege" to refuse requests for access to accident reports. According to the armed services, they are protecting the confidentiality of information obtained from crew members and from members of the public, such as manufacturers' representatives. As important as that confidentiality may be, it is not as important as permitting the public and the Congress access to information necessary to evaluate whether the military is doing its job properly. If an accident is attributed to human error or to the improper handling of public assets, both the public and Congress should have the opportunity to recommend changes in military policy, personnel, and equipment. Disclosure also would permit the public to weigh the costs against the benefits of proposed

improvements and to encourage Congress to approve justifiable expenditures. In addition to sharing these general civic interests, those who live in close proximity to military bases are also interested in monitoring the military's safety efforts for the sake of their own physical safety. Permitting the public and Congress to share in the results of the safety investigation will increase the involvement of all those who are concerned with the need for affirmative steps to improve aviation safety. Thus the public interest clearly militates in favor of disclosure of safety investigations.

Against the clear public interest in release of the safety investigations conducted by the armed services, the military has argued that it must maintain



the confidentiality of witness statements in order to obtain candid information from people directly and indirectly involved with an accident. Clearly, the military has a compelling need to obtain honest and complete information from witnesses to accidents. Enough procedures already are in place, however, to ensure that the need can be met without keeping the information confidential.

First, no Air Force member should feel any threat to his or her job as the result of giving candid information. The reports may not be used as evidence for disciplinary actions or in determining the misconduct or line of duty status of any personnel. A.F. Reg. 127-4, para. 2-5(b) (Appendix to Brief of Petitioner at 2a). Second, if a witness should refuse

to provide the requested information despite these assurances, the Air Force has the authority to order its personnel to testify about their knowledge of the accident. Brief for Petitioner at 3, n.3. Indeed, in some situations, confidentiality may encourage witnesses to be less than truthful because they know they will not be held accountable for their actions.<sup>2</sup>

Information provided by armed services personnel provided in safety investigations was found exempt from disclosure pursuant to Exemption 5 of the

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<sup>2</sup> If necessary, of course, identifying information could be redacted from a statement to protect the personal privacy of the witness. 5 U.S.C. 552(b)(6); Department of Air Force v. Rose, 425 U.S. 352 (1976); see Department of State v. Washington Post Co., 456 U.S. 595 (1982).

Freedom of Information Act in two cases upon which Petitioner relies. Brockway v. Department of the Air Force, 518 F.2d 1184 (8th Cir. 1975), and Cooper v. Department of the Navy, 558 F.2d 274, modified on other grounds, 594 F.2d 484 (5th Cir. 1977), cert. denied, 444 U.S. 926 (1979). Both courts relied in whole or in part on Machin. However, as has been shown, this reliance is misplaced, because in Machin the privilege was not found to apply to information provided by armed services personnel.

In F.T.C. v. Grolier, No. 82-372, (June 6, 1983), this Court held that "[t]he test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." Exemption 5 applies to

"exempt those documents, and only those documents, normally privileged in the civil discovery context." N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). As has been shown, courts applying the Machin privilege in civil discovery, beginning with the Machin court itself, have found that it extends only to information provided by private sources, and that it does not protect information provided by armed services personnel. The reinterpretation of the privilege by the Cooper and Brockway courts cannot be accepted. After Grolier, these cases no longer can be considered good law.<sup>3</sup>

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<sup>3</sup> Even before Grolier, the soundness of Cooper and Brockway was suspect. They rely on a close analogy between the Machin privilege and the predecisional or deliberative process privilege. As the government properly has conceded, however, the deliberative process

3 (continued) privilege does not apply in any way to the materials at issue here. Brief for Petitioner, at 32 n.27. While the materials clearly were created before any decision concerning the accident was made, not all predecisional materials are exempt from discovery under Exemption 5. Only predecisional material that is part of an agency's deliberative process is exempt. Further, purely factual materials reflected in deliberative process are not exempt. E.P.A. v. Mink, 410 U.S. 73, 89 (1973); see S. Rep. No. 813, 89th Cong., 1st Sess. 9-10 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966). In Mink this Court stressed that, with few exceptions, the legislative history of the Act means that "all factual materials in government records is to be made available to the public."

In applying the distinction between factual and deliberative materials, courts usually place witness statements, like other unevaluated materials, in the former category. See, e.g., Robbins Tire and Rubber Company v. N.L.R.B., 563 F.2d 724 (5th Cir. 1977), rev'd on other grounds, 437 U.S. 214 (1978); Kent Corp. v. N.L.R.B., 530 F.2d 612 (5th Cir. 1977). As the D.C. Circuit noted in a seminal FOIA decision, "unevaluated factual reports ... are frequently used by decisionmakers in coming to a determination, and yet it is beyond dispute that such documents would not be exempt...." Vaughn v. Rosen, 523 F.2d 1136 (1975); see F.O.M.C. v. Merrill, 443

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<sup>3</sup> (continued) U.S. 340, 360 (1978) ("the theory is that if advice is revealed, associates may be reluctant to be candid and frank) (emphasis added). In sum, the deliberative process privilege is designed to protect the process of candid discussion of facts, not the process of collecting the facts themselves. See ITT World Communications v. FCC, 699 F.2d 1219, 1238-39 (D.C. Cir. 1983); Playboy Enterprises, Inc. v. Department of Justice, 677 F.2d 931 (D.C. Cir. 1982); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980).

THE LEGISLATIVE HISTORY OF THE FREEDOM OF INFORMATION ACT SHOWS THAT CONGRESS DID NOT INTEND THAT THE MACHIN PRIVILEGE BE INCORPORATED INTO EXEMPTION 5

If this Court should find that the Machin privilege properly covers the statements of Air Force personnel, the question still remains whether Exemption 5 of the Freedom of Information Act incorporates the Machin privilege. The government has urged an affirmative response to this question on two grounds: first, that Exemption 5 incorporates all the privileges enjoyed by the government in the civil discovery context, including the Machin privilege; and second, that, even under a more restrictive reading of Exemption 5, the Machin privilege is incorporated into the exemption. The Amici Curiae will address these questions in the opposite order. Amici will show

that, first, Congress did not intend that the Machin privilege would be incorporated into Exemption 5. Second, Amici will show that this Court should reject the government's argument that all of the civil discovery privileges are incorporated into Exemption 5. Such an expansion of the Exemption will undermine the carefully drawn statutory scheme of the Freedom of Information Act.

The language originally proposed for Exemption 5 permitted agencies to withhold "interagency or intra-agency memorandums or letters dealing solely with matters of law or policy." After extensive hearings, the language was changed to read "interagency or intra-agency memorandums or letters which would not be available to a private party in litigation with the agency." This



language has been interpreted by this Court as incorporating four privileges: the executive, predecisional or deliberative process privilege, the attorney work-product privilege, the attorney-client privilege and the confidential commercial information privilege. F.T.C. v. Grolier, No. 82-372 (June 6, 1983); F.O.M.C. v. Merrill, 443 U.S. 340 (1979); N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975); E.P.A. v. Mink, 410 U.S. 73 (1973). The government now seeks to enlarge its authority to withhold information through the incorporation of yet another privilege into Exemption 5. There is no support for this enlargement in the legislative history of the Act.

At their hearings on the FOIA, Congressional committees were advised

that under the language originally proposed for Exemption 5 there was some question as to whether investigative files such as aircraft accident reports would be protected from disclosure. For example, the Department of Defense submitted a statement in which it stressed the importance of protecting aircraft accident investigation reports. The Department cited Machin to show that judicial recognition had been taken of the need to protect this kind of information. Federal Public Records Law: Hearings Before the Subcomm. of the House Comm. on Government Operations, 89th Cong., 1st Sess. 220 (1965). Based on the amendment of the original language of the FOIA and the fact that Congress was advised that the original language jeopardized the protection of aircraft

accident investigation reports, the government contends that Congress intended that Exemption 5 incorporate a privilege to protect statements such as the ones requested here.

A similar argument was made by the government in F.O.M.C. v. Merrill, 443 U.S. 340 (1979), with respect to a privilege for confidential commercial information generated by the government. Just as in this case, the government could point to the fact that the language of Exemption 5 was changed after Congress was advised during hearings that the requested material (Domestic Policy Directives) would not receive adequate protection under the original language. Id. at 357-58. However, the similarity between the two cases ends at that point. None of the other evidence of

Congressional intent relied on by this Court to find that Domestic Policy Directives could be protected by the incorporation into Exemption 5 of a privilege for confidential commercial information can be found to justify the incorporation into Exemption 5 of the Machin privilege to withhold statements by military personnel.

This Court began its analysis in Merrill with the observation that

Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution.

Id. at 355. The many differences between the facts in Merrill and this case demonstrate that caution will not be

served by incorporating the Machin privilege into Exemption 5. First, as this Court noted, the federal courts had "long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information" such as Domestic Policy Directives. Id. at 356. As was shown earlier in this brief, the Machin privilege as applied in civil discovery does not encompass the material requested in this case, the statements of Air Force personnel. Second, in Merrill this Court found support in the House Report on the FOIA for the propositions that Congress accepted as valid testimony about the need to protect government-generated confidential commercial information and intended that a privilege for such material be incorporated into Exemption 5. Id. at

357-59. No support can be found in either the Senate or the House Report for the proposition that Congress accepted as valid testimony that aircraft accident reports require protection, or for the proposition that Congress intended that a privilege protecting such material would be incorporated into Exemption 5. Finally, the materials covered by the Machin privilege in civil discovery, those provided by private parties such as equipment manufacturers, frequently qualify for exemption from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4). Unlike the situation in Merrill, therefore, accepting the government's argument here would mean incorporating into Exemption 5 a privilege that substantially duplicates another exemption. See id. at 339. The

conclusion is clear, therefore, that nothing in the legislative history of the Act or the prior decisions of this Court suggests that the Machin privilege should be incorporated into Exemption 5.<sup>4</sup>

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<sup>4</sup> An amendment was proposed to the Omnibus Defense Authorization Act, S. 675, 98th Cong., 1st Sess. Sec. 1009 (1983), to exempt from release under the Freedom of Information Act materials of the type requested in this case. Although it passed the Senate, it was not enacted because the Department of Defense failed to provide Congress with enough information on the need for the amendment. See S. Conf. Rep. No. 98-213, 98th Cong., 1st Sess. 264 (1983). As was shown above, the Department of Defense also failed in 1965 to persuade Congress that these materials should be exempt from the release under the FOIA. See pages 28-35, supra. In light of this earlier Congressional consideration and rejection of the Department's position, the defeat of the amendment to S. 675 should be viewed as additional evidence that Congress does not intend that the requested materials be exempt from mandatory release under the FOIA.

incorporate solely the Machin privilege into Exemption 5, the government urges this Court to reinterpret the FOIA and the legislative history of Exemption 5 to incorporate within it all the privileges enjoyed by the government in civil discovery. It contends that if the Court fails to do this, litigants could use the Freedom of Information Act as a means to circumvent civil discovery limitations on access to information, with the result that the government would become a "second-class litigant."<sup>5</sup> The problem with the government's argument is that,

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<sup>5</sup> A recent consultant's report to the Administrative Conference disputes the validity of this claim. E. Tomlinson, Report to the Administrative Conference, The Use of the Freedom of Information Act for Discovery Purposes (Aug. 1983).



if accepted, the carefully structured scheme of the Freedom of Information Act would be undermined.<sup>6</sup>

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<sup>6</sup> It is worthy of note that, in contrast to the current position of the government, the Attorney General gave a much narrower interpretation of Exemption 5 in his initial interpretation of the Freedom of Information Act. Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967). The Memorandum was an effort "to correlate the text of the act with its relevant legislative history" and to provide agencies with a "sound working basis" for using the Act. Id. at iv. According to the Memorandum, "any internal memorandum which would 'routinely be disclosed to a private party through the discovery process in litigation with the agency' is intended by the clause in Exemption (5) to be 'available to the general public' (H. Rep. 10) unless protected by some other exemption." Id. at 35 (emphasis added). In noting the types of materials withholdable under Exemption 5, the Attorney General pointed out that "internal communications which would not routinely be available to a party to litigation with the agency, such as internal drafts, memoranda between

A few examples will suffice to demonstrate that incorporation of civil discovery privileges into the Freedom of Information Act will result in more information being withheld from the public than is the case under the current interpretations of the Act's exemptions.

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6 (continued) officials or agencies, opinions and interpretations prepared by agency personnel or consultants for the use of the agency, and records of the deliberations of the agency or staff groups remain exempt so that free exchange of ideas will not be inhibited." Id. at 35. Contrary to the government's arguments in this case, the memorandum does not suggest that Exemption 5 covers witness statements given by armed services personnel, nor does it suggest that Exemption 5 properly is interpreted as incorporating every civil discovery privilege.

In Halkins v. Helms, 598 F.2d 1 (D.C. Cir. 1978), the plaintiffs, 27 individuals and organizations formerly active in opposing participation by the United States in the war in Vietnam, requested in discovery information pertaining to government interception of their foreign communications. The court upheld the government's assertion of the state secrets privilege with respect to the information. According to the court, the information is privileged from civil discovery where "there is a reasonable danger that compulsion of evidence will expose military matters which, in the interest of national security, should not be divulged." Id. at 9 (emphasis added).

In contrast to the Halkins v. Helms standard, Exemption 1 of the FOIA mandates that information can be withheld for national security reasons only where it is properly classified pursuant to the criteria of the Executive order on classification. 5 U.S.C. 552(b)(1); cf. E.P.A. v. Mink, 410 U.S. 73 (1973). Executive Order 12065 was the applicable Executive order at the time of the Halkins decision. E.O. 12065, June 28, 1978, Weekly Compilation of Presidential Documents, vol. 14, no. 26, p. 1194 (July 3, 1978). Under the least restrictive standard of that Order, "confidential" information could be classified only where its unauthorized disclosure "reasonably could be expected to cause identifiable damage to national security," a much higher standard than

that applied by the Halkins court. Id.,  
Section 1.104. As the dissenters noted  
in Halkins,

[T]he standard applied by the panel  
... produces the anomalous result  
that a FOIA requester, who may have  
no special need for the requested  
information, is given broader access  
to government information than a  
plaintiff who requires the  
information in order to pursue  
remedies for violation of  
constitutional rights. ...  
Henceforth, plaintiffs seeking  
information in a civil suit will  
simply file a simultaneous FOIA  
request to reap the advantage of the  
broader inquiry under FOIA.

Halkins v. Helms, supra, 598 F.2d at 16  
(dissenting opinion of Bazelon, Jr.,  
joined by Wright, J. on decision not to  
grant rehearing en banc). See Baez v.  
Department of Justice, 647 F.2d 1328,  
1337 (D.C. Cir. 1980). If the  
government's assertion that Exemption 5  
incorporates all civil discovery  
privileges enjoyed by the government, the

Halkins standard would replace Exemption 1, and, depending on the applicable Executive order, less information may be released to the public.

Another example is found in County of Madison, N.Y. v. Department of Justice, 641 F.2d 1036 (1st Cir. 1981), in which the FOIA requester sought the release of documents relating to settlement negotiations between the government and a third party. Although these would be privileged in civil discovery, the court declined to expand Exemption 5 to permit the documents to be withheld under the Freedom of Information Act. If the government's argument in this case had been law, the requested documents would have been withheld. See id. at 1040; Center for Auto Safety v.

Justice Department, 3 GDS para. 83,239  
(D.D.C. 1983).

Discovery decisions are based on a balancing between the need of one party to obtain the information against the need of the other party either to protect the information or to avoid the inconvenience of producing it. So long as the balance is fair, a district court may deal out "rough justice" in deciding discovery disputes without being reversed by an appellate court. If these results were translated into the FOIA context by the expansion of Exemption 5 to incorporate all the civil discovery privileges enjoyed by the government, much information that in the past has been released to FOIA requesters instead would be withheld. Compare Playboy Enterprises, Inc. v. Department of

Justice, 677 F.2d 931, 936 (D.C. Cir. 1982) with Peck v. United States, 88 F.R.D. 65 (S.D. N.Y. 1980). A good example is Swanner v. United States, 406 F.2d 716 (5th Cir. 1969), in which the court refused to overturn the district court's decision that entire investigatory files could be withheld in civil discovery, because it was clear that certain portions of the file undoubtedly would be found to be privileged. Following the 1974 amendments to the FOIA, only those portions of investigatory files that meet one of six specific criteria may be withheld; the remainder of the information must be segregated from the exempt material and made available to the requester. 5 U.S.C. 552 U.S.C. 552(b)(7)(A)-(F); see FBI v. Abramson,



456 U.S. 615 (1982); cf. Weisberg v. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973). Thus, while no "blanket" exemption for investigatory files now exists under the FOIA, one could be created if the government's suggested expansion of Exemption 5 were adopted by this Court.

As these few examples demonstrate, the incorporation into Exemption 5 of all of the civil discovery privileges enjoyed by the government jeopardizes the balance struck by Congress between the public's need for information and the government's need for secrecy. If it is true, as the government contends, that enactment of the FOIA made the government a "second-class litigant," it should seek its relief from the Congress, rather than

asking this Court to disrupt the  
Congressional plan.

## CONCLUSION

The Senate Report on the Freedom of Information Act sets forth as the Act's purpose the establishment of "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 98th Cong., 1st Sess. 3 (1965). The Committee stressed that the bill was "not a withholding statute but a disclosure statute," and explained that "[i]t sets up workable standards for what records should and should not be open to public inspection." Id. at 5. Congress heard testimony from many witnesses who advocated that the government be permitted broad authority to withhold material under the parameters of Exemption 5, and yet it enacted a narrow

exemption with a limited number of recognized privileges. Had Congress intended for Exemption 5 to incorporate every civil discovery privilege enjoyed by the government, it would have so indicated either in the Reports or in the "clearly delineated statutory language." Id. at 3.

The FOIA is a precisely-structured statutory scheme for requiring the release of government information. If Exemption 5 is interpreted as permitting the withholding of all information which can be found privileged in civil discovery, without regard to whether there is an overlapping exemption or an intention on the part of Congress for the specific information to be withheld, the exemption will grow to permit the withholding of types of information that

Congress was not contemplating when it enacted the FOIA. In short, the precision of the statutory scheme will be sacrificed to broad withholding claims on the part of the government. The primary purpose of FOIA, to provide information to the people served by a democratic government and to the press that disseminates information to the public, will be sacrificed as well.

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Counsel for Amici Curiae

Of Counsel:  
Jack C. Landau  
Elaine English

December 1983

## APPENDIX A

### AFFIDAVIT OF DAVID A BROWDE

1. I am a news correspondent for WNEW, an independent television station in New York. Previously, I was the National Security Correspondent for Independent Television News Association (ITNA), an independent news service providing national news coverage to 21 independent television stations around the United States. I specialize in reporting on activities of the Department of Defense, including the Air Force and the Department of Navy.

2. I first became aware of the problems in gaining access to military accident investigation reports in 1979, as the military affairs reporter for WVEC-TV in Norfolk, Virginia. I

was investigating an accident involving a U.S. Navy ship, the "Francis Marion" and a Greek vessel, the "Star Light". In that collision, the damage sustained was relatively low dollar value , however, one sailor lost his legs and others were injured.

3. Through the Freedom of Information Act, I was able to obtain one of the Navy's accident investigation reports. This report contained descriptions and an account of the incident, technical evidence, maps depicting the accident scene, and summaries and chronologies showing how the accident scene appeared after the investigation. Certain names and all recommendations and conclusions were deleted.

4. The Navy's second report, known as an Article 31 report, was

also withheld. The Navy claimed that disclosure was prohibited because of the necessity of assuring confidentiality to all witnesses who participated in the Article 31 proceedings. According to the Navy, witnesses were promised that their testimony would only be used to develop preventive measures to insure that similar accidents did not occur.

5. The information I received disclosed the facts surrounding the incident as determined by the Navy, but I had no idea of who was at fault, the cause of the accident, or what action would be taken in response to the collision.

6. On May 26, 1981, an EA-6B aircraft crash-landed on the flight deck of the U.S.S. Nimitz during



training exercises in the Atlantic Ocean off the Florida coast. This accident took more than ten lives and cost approximately one quarter billion dollars to repair. There were allegations that drug use contributed to the accident, but the Navy refused to release the Article 31 reports to confirm or deny these charges.

7. After my Freedom of Information Act request, the Navy classified as "confidential" and withheld certain videotapes which showed the actual crash. I thereafter sued the Navy to obtain these tapes, but lost my challenge in both U.S. District Court and in the Court of Appeals.

8. In my opinion, accident investigation reports are important to

the public because they represent the best and most impartial analysis of what went wrong in an accident.

9. Withholding these reports is an easy way for potentially embarrassing material or evidence of a generic fault in an aircraft or subsystem to be buried out of the public's view.

10. Though the military has a strong self-interest in correcting faults that may be revealed by these reports, the solutions often suggested by the military officials involve huge costs and expenditures. As taxpayers and citizens, the American public has an interest in knowing about these costs and in monitoring any remedial action which is taken.

11. I believe that certain technical information requiring

special protection can be safely maintained while a maximum amount of information regarding the causes of accidents and often deaths of American soldiers is released. Although reporters rarely wish to damage national security, I believe that it is possible to safeguard that security while still providing complete information about the cause of an aircraft accident.

In accordance with 28 U.S.C. section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

//s//  
David A. Browde

November 28, 1983

## APPENDIX B

### AFFIDAVIT OF FRED KAPLAN

1. I am presently a defense correspondent for the Boston Globe. I have also written for other publications, including the N.Y. Times, Washington Post, Atlantic, Scientific American, Der Spiegel, The New Republic, and American Heritage.

2. I have frequently used the Freedom of Information Act and Executive Order declassification procedures, especially while researching a book about nuclear strategy (published earlier this year by Simon & Schuster) called "The Wizards of Armageddon."

3. From 1978-80, I was legislative assistant to Representative Les Aspin (D-Wis.) and

it was during that time that I actually saw aircraft safety investigation reports -- the same kind of documents which are the subject of this lawsuit.

4. Late in 1978, I began to receive reports from a confidential source inside the Navy. They were "casualty reports" concerning a number of Naval aircraft accidents, involving A-7s, F-14s, and an EA-6B, which had occurred in recent years. The documents clearly indicated that many of the crashes were caused by technical flaws in the catapult and landing-gear equipment, especially the Capacity Selector Valve control system, onboard aircraft carriers.

5. From another source inside the Navy, I received reports which

revealed that in 1970, the Naval Air Test Facility in Lakehurst, New Jersey had warned the design agency, the Naval Air Engineering Center, and the Naval Air Systems Command that this equipment was faulty and could cause accidents. However, no action was taken on these recommendations. In 1978 alone this problem led to at least 7 plane crashes with 4 fatalities.

6. Rep. Aspin requested formal access to these documents, but the Navy denied his request citing "executive privilege," notwithstanding the fact that as a member of the House Armed Services Committee, Aspin had top security clearances. See Press Release of January 22, 1979, attached to this affidavit.

7. From all the documents I saw regarding these accidents, the cause of the crashes was clear and the remedies were known and not expensive (technical people at the time told Rep. Aspin that corrections could be made for approximately \$100,000). However because of the military's practices regarding air accident reports, the cause and the remedy -- more to the point, the guilt and the responsibility -- were kept bundled in secrecy. Indeed, were it not for these leaks, no one outside the Navy would have ever found out what caused these crashes.

8. The public most certainly has an interest in having access to these reports. Some military accidents are caused by "human error." However,

many are caused by negligence of the military service, i.e., the government. The government must be held accountable for such negligence. Many officials with whom I have spoken, as a reporter, are convinced that the regulations on air accident reports are so strict precisely because the military wants to elude that accountability.

9. Pentagon legal officials say, quite correctly, that witnesses called to testify before boards of inquiry may be reluctant to tell the whole truth if they think their words might be used to incriminate themselves or their superiors. However, just because certain portions of an accident report might be sensitive does not mean that, as a consequence,



the entire document must be locked up, away from the eyes not only of the general public but even of Congressmen.

10. In my research, I have received numerous documents from the government where exempt or classified portions have been segregated out and deleted, it seems that similar procedures could be adopted to protect the truly sensitive portions of aircraft safety investigation reports, while still providing essential factual information about the crash to the public.

In accordance with 28  
U.S.C. section 1746, I  
declare under penalty  
of perjury that the  
foregoing is true and  
correct to the best of  
my knowledge.

    //s//      
Fred Kaplan

December 2, 1983

FOUO RELEASE FROM CONGRESSMAN LES ASPIN  
 RELEASE TIME:  
Monday, January 22, 1979, A.M. Papers  
 For further inquiry contact Fred Kaplan

442 Cannon Building  
 Washington, D.C. 20515  
 202 225-3031

NAVY CLAIMS "EXECUTIVE PRIVILEGE,"  
REFUSES AIRPLANE CRASH DOCUMENTS TO ASPIN

WASHINGTON, D.C. -- The Navy has claimed "executive privilege" in refusing to release standard reports on military airplane crashes, Rep. Les Aspin (D-Wis.) announced today.

Last month, Aspin charged the Navy with "gross negligence" for not repairing catapult and arresting-gear systems on aircraft carriers, an omission that may have caused at least seven plane crashes and four deaths over the past year.

Shortly after, Aspin requested copies of Navy Safety Center reports entitled "Fixed-Wing Catapult Mishaps" and "Fixed-Wing Recovery Mishaps," detailing aircraft-carrier accidents from 1970 to the present. He also asked for a copy of the Inspector General's report on the Naval Air Engineering Center, which designed the faulty equipment.

Aspin has been told by reliable sources that these documents indicate the defective systems caused still more accidents over the years.

But the Navy refused Aspin's request, citing "executive privilege."

"This refusal has all the appearances of a systematic cover-up," Aspin remarked.

"The 'executive privilege' claim isn't even relevant. And the fact that the Navy took more than a month to respond to my request indicates that their legal staff must have searched every nook and cranny to find something on which they could pin a refusal," Aspin commented.

"The Navy cited two cases in current litigation to justify their refusal, yet these cases are not applicable to my request," Aspin said.

Attached to the Navy's letter to Aspin, dated January 10 refusing access to the documents, was an affidavit written by Secretary Claytor on May 26, 1977. Referring to a lawsuit pending in a Florida

district court, Claytor denied the plaintiff access to aviation accident reports, citing "executive privilege."

In the affidavit, Claytor argued that Navy accident reports are based on information obtained confidentially from crew members, and that they are to be used strictly for improving aviation safety, not for pressing lawsuits.

The Navy refused copies of the reports to Aspin because delivering "portions of these...to Congressman Aspin for his use in a non-Committee function could be used to rebut Navy's contention that aviation safety is the only purpose of this report."

Aspin commented, "First, this claim of executive privilege does not have the authority of law, but is just a position taken by the Navy in two lawsuits still pending.

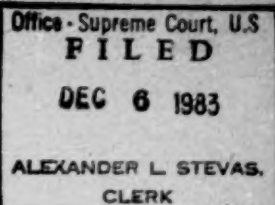
Second, as the Navy well knows, my investigation of this matter pertains solely to improving aviation safety, which I don't think certain people in the Navy are treating seriously enough."

Aspin released information on December 7 detailing the causes of various Navy airplane crashes and called for a Congressional investigation, which is now in its preliminary stage in the House Armed Services Committee.

"The Navy's 'executive privilege' claim makes things look more suspicious than ever," Aspin stated. "I regret it because this sort of tactic is all too reminiscent of a period in American politics I thought this Administration had denounced."

Aspin is a member of the Seapower Subcommittee of the House Armed Services Committee, which has jurisdiction over all naval issues.

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No. 82-1616  
IN THE  
**Supreme Court of the United States**

October Term, 1983

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

WEBER AIRCRAFT CORPORATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT.

**BRIEF OF AMICUS CURIAE.**  
IN SUPPORT OF AFFIRMANCE

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## **INTEREST OF AMICUS CURIAE.**

United States Forgecraft Corporation [hereinafter "Amicus"] files this brief pursuant to Rule 36 of the Rules of the Supreme Court of the United States. In the trial below, Amicus serves as a codefendant with respondents Weber Aircraft Corporation and Mills Manufacturing Corporation. This brief supports their contentions. Additionally, Amicus hopes to assist this Court in resolving the conflicts in the appellate decisions that address Exemption 5 to the Freedom of Information Act, and military aircraft crash investigations. Critical nuances in alleged privileges and exemptions under the Freedom of Information Act require detailed analysis. The effectiveness and fairness of future military aircraft crash litigation depend on the outcome. In addition, Amicus believes that the disclosure of facts gathered during government investigations is a public right worthy of careful protection.

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No. 82-1616  
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October Term, 1983

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UNITED STATES OF AMERICA,

*Petitioner,*

vs.

WEBER AIRCRAFT CORPORATION, *et al.*

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**BRIEF OF AMICUS CURIAE.**

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**SUMMARY OF ARGUMENT.**

A plain reading shows that Exemption 5 to the Freedom of Information Act cannot bar disclosure unless the information sought falls within a recognized civil discovery privilege. The witness statements, in this case, were never privileged.

The Court of Appeals for the District of Columbia expressly limited the *Machin* privilege to statements made by *civilian* personnel. *Machin v. Zuckert*, 316 F.2d 336, 339 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963). The court realized that private parties are not required to testify before military safety investigation boards. In addition, the prospective liability of their employers and their own job security could be adversely affected by their testimony. In that environment, the promise of confidentiality and the corresponding privilege recognized in *Machin* have merit.

On the other hand, military personnel are duty-bound to testify before safety investigation boards. *See generally* A.F.

Reg. 127-4, para. 1 (Jan. 1, 1973). They also know that, by regulation, their commander and his supervisors are quickly notified of any admissions bearing on their own fault, or that of friends. *See id.* at paras. 13-16. In such an environment, a promise of confidentiality has little, if any, purpose. A privilege based on that promise is even less necessary. The holding in *Machin* is consistent with this reality.

The Court of Appeals for the Eighth Circuit, however, essentially ignored this important distinction in *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975). In a clearer manner, the Court of Appeals for the Fifth Circuit candidly admitted that it failed to understand the distinction made in *Machin* between civilian statements and those of military personnel. *Cooper v. Department of the Navy*, 558 F.2d 274, 277-78 (5th Cir. 1977), *modified on other grounds*, 594 F.2d 484, *cert. denied*, 444 U.S. 926 (1979). As a consequence, the Fifth Circuit followed the Eighth and extended the *Machin* privilege to statements made by military personnel. *Id.*

Amicus urges this Court to reject that ill-founded extension, and hold, in accordance with the Court of Appeals for the District of Columbia, that the *Machin* privilege does not apply to statements made by service personnel during military aircraft accident investigations.

In addition, while arguing that a privilege exists, petitioners emphasize that the statements at issue "were obtained under a pledge of confidentiality." Brief for Petitioner at 24. A bare promise of confidentiality by the government, however, cannot create a civil discovery privilege. Although the Air Force can limit its own internal use of witness statements, it exceeds its authority in attempting to use its own regulations and promises of confidentiality to restrict civilian access to unclassified government infor-

mation. *See, e.g.,* A.F. Reg. 127-4, para. 19a(3) (Jan. 1, 1973). Amicus asks this Court to firmly reject that abuse of authority.

On the other hand, even if statements made by military personnel to safety investigators are deemed to be privileged, Exemption 5 should not apply in this case. In keeping with congressional intent and past judicial interpretations, the exemptions to the Freedom of Information Act should be narrowly construed. Exemption 5 was never designed to bar access to *factual data* gathered by government investigators. That is especially true where, as here, a bar to disclosure would adversely affect the rights and liabilities of private citizens. Amicus firmly believes that this Court should continue to hold government investigations subject to close public scrutiny.

If, however, the Court determines that a privilege and exemption should apply to the witness statements in this case, a waiver has occurred. At a deposition in 1976, certain of these statements were released by Air Force employees to the counsel present at that time. The Air Force subsequently confiscated the documents. To now suppress the statements is manifestly unfair.

In any event, disclosure of the particular statements in this case is required to satisfy the truth-seeking function of our judicial system. By regulation, the Air Force safety investigation is conducted immediately after an aircraft accident. Witnesses are interrogated before they have an opportunity to forget or fabricate the details. In the present case, timely investigation disclosed the truth.

The documents that were released at the 1976 deposition indicate that Hoover (the pilot-plaintiff) and Dickson (the Air Force parachute rigger) drastically altered their testimony between the time of the safety investigation and their

subsequent depositions. Their changing testimony directly concerns the nature and cause of the accident, tends to reveal the truth, and bears upon the central issues of rights and liabilities in the underlying case.

In addition, the events leading to Hoover's injury happened more than ten years ago. The evidence is decidedly stale. This staleness and the changing testimony by each of the key figures in the underlying litigation make an effective and fair trial unlikely. The fairness of trial, in particular, hinges dramatically on using the most accurate evidence available. That evidence, which is most likely to contain the truth, exists in the witness statements that the government would suppress. Amicus urges this Court to prevent that suppression of truth.

## ARGUMENT.

### I.

**EXEMPTION 5 TO THE FREEDOM OF INFORMATION ACT IS TRIGGERED BY A PRIVILEGE; NO PRIVILEGE EXISTS IN THIS CASE AND, THUS, THE WITNESS STATEMENTS MUST BE DISCLOSED.**

**A. Exemption 5 Cannot Bar Disclosure Without an Underlying Privilege.**

The Congressional philosophy leading to the Freedom of Information Act [hereinafter "FOIA"] requires full disclosure unless information is exempted under clearly delineated statutory language. S.Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Exemption 5 specifically excludes: "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). This Court held that "it is reasonable to construe Exemption 5 to exempt those documents, and *only those documents*, normally privileged in the civil discovery context." *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (emphasis added).

In addition, Congress expressly mandated that the FOIA "does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated*." 5 U.S.C. § 552(c) (emphasis added). As a direct result, Exemption 5 cannot bar disclosure unless the information sought is subject to a recognized civil discovery privilege.

**B. The *Machin* Privilege Is Limited to Private Parties and Does Not Apply in This Case.**

"[A] claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution." *Federal Open Market Committee*



*v. Merrill*, 443 U.S. 340, 355 (1979). Petitioner alleges that the Court of Appeals for the District of Columbia in *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963) established a civil discovery privilege for all confidential witness statements made during military safety investigations. Brief for Petitioner at 5 n.10. Such is not the case.

The Court of Appeals for the District of Columbia carefully delineated the holding in *Machin*. The court stated: "Insofar, therefore, as the subpoena sought to obtain *testimony of private parties* who participated in the investigation, we agree with the District Court that such information in the hands of the Government is privileged." *Machin, supra*, at 339 (emphasis added). The court further held, however, that statements and factual findings by Air Force personnel who examined the wreckage in that case were *not* necessarily privileged. *Id.* at 340. The court explained that those "portions of the report could be revealed without in any way jeopardizing the future success of Air Force accident investigations." *Id.* (footnote omitted).

In its supplemental opinion, the court held that: "If the [Air Force] mechanics expressed any 'opinions' or 'conclusions' as to possible defects in the propellers or propeller governors that might have been due to the negligence of United Aircraft, we do not consider that such expressions would come within the privileges enunciated in our opinion." *Id.* at 341 (supplemental opinion). As a result, the court ordered disclosure of the factual findings, statements, opinions and conclusions of Air Force personnel concerning the cause of the aircraft accident. *Id.*

The Court of Appeals for the Fifth Circuit, however, applied the *Machin* privilege to statements made by military personnel during an aircraft investigation. *Cooper v. Department of the Navy of the United States*, 558 F.2d 274,

278 (5th Cir. 1977), *modified on other grounds*, 594 F.2d 484, *cert. denied*, 444 U.S. 926 (1979). The court recognized that the Court of Appeals for the District of Columbia expressly limited the *Machin* privilege to statements made by private parties as opposed to service personnel, but was "unable to follow the reasoning upon which the distinction rests." *Id.* at 277. The Fifth Circuit elected instead to follow the Eighth Circuit decision in *Brockway v. Department of the Air Force*, 518 F.2d 1184, 1192 (1975) where the *Machin* distinction between statements by military and civilian personnel was essentially ignored. *Cooper, supra*, at 277-78.

Basing the privilege on the source of the statement, however, is justified by a well-founded distinction. As the Court of Appeals for the Fifth Circuit emphasized, private parties such as civilian aerospace employees naturally fear subsequent suit against their employer due to information divulged by them during aircraft safety investigations. *Id.* at 277. In addition, their income and promotion prospects hinge on any words they might volunteer to the Air Force Investigation Board. The integrity and reputation of their employer's product is normally at stake.

As a result, the promise of confidentiality is arguably needed in convincing civilians to make statements to Air Force investigators. The same may not be said of service personnel. Military personnel are duty-bound to report to the Air Force Investigation Board. *See generally* A.F. Reg. 127-4, para. 1 (Jan. 1, 1973). Civilians have a choice. That choice is the source of the well-founded distinction in *Machin* as evidenced by the court's reliance on *Boeing Airplane Company v. Coggeshall*, 280 F.2d 654, 660-61 (D.C. Cir. 1960) (emphasizing judicial concern with situations "where the Government depends on volunteered information from private citizens"). *Machin v. Zuckert, supra*, at 340. Thus, the purpose of the promise of confidentiality and its cor-

responding privilege is to induce and encourage voluntary appearances by civilian witnesses who otherwise might not choose to offer their testimony. That purpose does not exist as to military personnel.

In addition, a privilege based on a "promise of confidentiality" to service personnel is unrealistic. The military person knows he has a duty to make statements to the Air Force safety investigators. He also knows that the same investigators report directly to his commanders. A.F. Reg. 127-4, paras. 9 and 13-16 (Jan. 1, 1973). His every admission concerning the air crash receives immediate attention at the highest levels within the Air Force. A.F. Reg. 127-4, paras. 2 and 13-16 (Jan. 1, 1973).

It is naive to believe that a "promise of confidentiality" would encourage a service person to divulge information potentially dangerous to his career or that a friend. As stated by the Court of Appeals for the Fifth Circuit: "[S]ervice people are human, too: They fear disciplinary action, work and hope for promotion, possess loyalties and ties of friendship to people and organizations, [and] dislike speculating to the derogation of the dead." *Brockway, supra*, at 277.

The military person knows full well that, by regulation, his commanders will be informed of his admissions. A.F. Reg. 127-4, paras. 13-16 (Jan. 1, 1973). A promise of confidentiality in that environment rings hollow.

Just as clearly, a service person, unlike a private citizen, needs no "promise of confidentiality" to divulge information that is not potentially dangerous to his career or that of a friend. That is his duty. When military personnel volunteer information during an aircraft accident investigation, it is out of that sense of duty, *not* a "promise of confidentiality."

For these reasons, Amicus urges this Court to hold, in accordance with the Court of Appeals for the District of

Columbia, that the *Machin* privilege does not apply to statements made by service personnel during military aircraft crash investigations.

**C. A Promise of Confidentiality Alone Cannot Create a Privilege.**

In arguing that a privilege exists, petitioners emphasize that the statements at issue "were obtained under a pledge of confidentiality." Brief for Petitioner at 24. The courts, however, have repeatedly rejected the proposition that promises of confidentiality give rise to a privilege, or a corresponding exemption under the Freedom of Information Act. *Petkas v. Staats*, 501 F.2d 887 (D.C. Cir. 1974); *Robles v. Environmental Protection Agency*, 484 F.2d 843 (4th Cir. 1973); *Ackerly v. Ley*, 420 F.2d 1336 (D.C. Cir. 1969).

In *Petkas v. Staats*, *supra*, the Court of Appeals for the District of Columbia held that the government's promise of confidentiality to defense contractors regarding their cost accounting methods was not enough to defeat the public right to disclosure under the Freedom of Information Act. *Id.* at 889 (discussing Exemption 4). The Court of Appeals for the Fourth Circuit held in *Robles v. Environmental Protection Agency*, *supra*, that government promises of confidentiality made while acquiring information cannot defeat disclosure. *Id.* at 846 (Exemption 6). In *Ackerly v. Ley*, *supra*, the Court of Appeals for the District of Columbia emphasized that: "It will obviously not be enough for the agency to assert simply that it received the file under a pledge of confidentiality to the one who supplied it. Undertakings of that nature cannot, in and of themselves, override the [Freedom of Information] Act." *Id.* at 1340 n.3.

As mentioned earlier, the Department of the Air Force has obvious authority to promise confidentiality and restrict the use of gathered information within the Air Force itself. A.F. Reg. 127-4, para. 19a(1) (Jan. 1, 1973). The internal practices and policies of the Air Force, however, are not at issue in this case. The fulcrum of the test as to whether Exemption 5 applies is "discovery practices as regulated by the courts, not discovery as it is practiced by the government." *Consumer Union of the United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 804 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971). Clearly, the Air Force ventures beyond its authority when attempting to use its own regulations and promises of confidentiality to restrict civilian access to unclassified government information. See A.F. Reg. 127-4, para. 19a(3) (Jan. 1, 1973). As stated by the court in *Ditlow v. Volpe*, 362 F. Supp. 1321 (D.D.C. 1973), *rev'd on other grounds*, 494 F.2d 1073 (D.C. Cir. 1974): "The mere promise of confidentiality cannot create an exemption from the statute under which the agency is required to disclose the information. Such an approach would enable the agency to render meaningless the statutory scheme." *Id.* at 1324 n.4 (citations omitted).

The Air Force has no authority whatsoever to use unilateral promises of confidentiality to restrict civilian access to information. A civil discovery privilege cannot be created in that manner; naked promises should not defeat the public's right to disclosure. See *Getman v. National Labor Relations Board*, 450 F.2d 670, 673 (D.C. Cir. 1971); *Ditlow v. Volpe*, *supra*, at 1324 n.4; *Legal Aid Society v. Schulz*, 349 F. Supp. 771, 776 (N.D. Cal. 1972).

**D. Without a Privilege, the Witness Statements Must Be Disclosed Pursuant to the Freedom of Information Act.**

Exemption 5 cannot apply because there is no recognized privilege in this case to invoke that exemption. In addition, no other exemptions apply. As stated by petitioners:

“[S]tatements such as those at issue here are not classified documents (Exemption 1), do not relate solely to agency personnel rules or practices (Exemption 2), are not specifically exempted from disclosure by any other statute (Exemption 3), do not contain confidential or privileged trade secrets or commercial or financial information (Exemption 4), do not contain information ‘the disclosure of which would constitute a clearly unwarranted invasion of personal privacy’ (Exemption 6), are not ‘investigatory records compiled for law enforcement purposes’ (Exemption 7), are not contained in or related to reports prepared by, on behalf, or for the use of an agency that regulates or supervises financial institutions (Exemption 8), and do not contain ‘geological and geophysical information and data . . . concerning wells’ (Exemption 9).” Brief For Petitioner at 30.

In establishing the FOIA, Congress required that “all materials of the Government are to be made available to the public . . . unless explicitly allowed to be kept secret by one of the exemptions.” S.Rep. No. 813, 89th Cong., 1st Sess. 10 (1965); *see also* H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 11 (1966). In the absence of an exemption, disclosure is mandated. *See* 5 U.S.C. § 552(c). In this case, no exemptions apply; therefore, the Freedom of Information Act requires that the witness statements at issue be disclosed.

As the Court of Appeals for the Ninth Circuit concluded: “To decide that the FOIA authorizes the government to



withhold the witness statements at issue, we would have to amend the FOIA judicially. This we are unwilling to do.” *Weber Aircraft Corp. v. United States*, 688 F.2d 638, 644 (1982). Amicus asks this Court to affirm that decision.

II.

**EVEN IF A PRIVILEGE IS FOUND, EXEMPTION 5 SHOULD NOT APPLY IN THIS CASE.**

**A. Congress Never Intended Exemption 5 to Bar Disclosure of Facts Gathered During a Government Investigation.**

The basic policy of the FOIA favors disclosure. *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). As a result, the FOIA should be broadly construed in favor of disclosure, *id.* at 366, and, unless the information falls squarely within one of the statutory exemptions, it must be disclosed on demand to any member of the general public. *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-21 (1978). Also, the statutory exemptions should be narrowly construed with all doubts resolved in favor of disclosure. *Department of the Air Force v. Rose*, *supra*, at 361-62; *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79-80 (1973), and the federal agency has the burden of justifying nondisclosure. 5 U.S.C. § 552(a)(4)(B). In particular, the Senate emphasized that the drafting committee “attempted to delimit [Exemption 5] as narrowly as consistent with efficient Government operations.” S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

As stated by the court in *Bristol-Meyers Co. v. Federal Trade Commission*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970):

“The statute exempts ‘inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation

with the agency.' This provision encourages the free exchange of ideas among government policy makers, but it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum." *Id.* at 939 (citations omitted).

In the present case, the Air Force wants to bar the disclosure of facts contained in witness statements by attempting to force fit the statements into Exemption 5. The government must not be allowed to bury facts under the guise of that exemption.

**B. The Courts and Congress Agree That Government Investigations Should Be Open to Disclosure.**

Courts have generally agreed that Exemption 5 should not apply to factual material gathered during government investigations. *See, e.g., Environmental Protection Agency v. Mink, supra.* This principle should apply with particular force where, as here, nondisclosure directly affects the rights and liabilities of private citizens. As this Court explained in *Environmental Protection Agency v. Mink, supra*, at 89: "[V]irtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other."

The Court of Appeals for the District of Columbia has stated that Exemption 5 covers: "Internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, *but not purely factual or investigatory reports.*" *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (emphasis added). *See also Title Guarantee Co. v. National Labor Relations Board*, 534 F.2d 484, 492 n.15 (2d Cir.), *cert.*



*denied*, 429 U.S. 834 (1976); *Tennessean Newspapers, Inc. v. Federal Housing Authority*, 464 F.2d 657, 660 (6th Cir. 1972); *Local 30, United States, Tile and Composition Roofers v. National Labor Relations Board*, 408 F. Supp. 520, 527 (E.D. Pa. 1976); *M.A. Schapiro & Co. v. Securities & Exchange Commission*, 339 F. Supp. 467, 470 (D.D.C. 1972); *Consumer Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

The witness statements at issue in this case are part of a government investigatory report, and contain critical facts. The weight of case law clearly indicates that disclosure of such data should not be barred by Exemption 5. In addition, Congress considered an express exemption for investigatory reports, and carefully limited that exclusion to "investigatory records compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). Had Congress intended a more widespread exclusion for reports based on government investigations, one can reasonably assume they would have expressly indicated that intent in the FOIA. They did not. In accordance with past judicial and legislative opinions, Amicus urges this Court to continue to hold government investigations subject to close public scrutiny. Correspondingly, the witness statements in this case should be disclosed.

### III.

#### **IF A PRIVILEGE AND AN EXEMPTION ARE FOUND TO APPLY, THE RELEASE OF DOCUMENTS BY THE AIR FORCE CONSTITUTED A WAIVER.**

The deposition of John F. Findley, a United States Air Force employee, was taken in the underlying case at Kelly Air Force Base, Texas, on June 9, 1976. During testimony, Mr. Findley produced a number of documents pursuant to valid subpoena. The documents contained excerpts from Hoover's statement to the Accident Investigation Board, and

the official determination that military personnel error caused Hoover's injuries. Those documents were reviewed by the counsel present at that deposition. Thereafter, the Air Force confiscated the documents alleging that they were privileged.

In *Cooper v. Department of the Navy*, 594 F.2d 484 (5th Cir.), *cert. denied*, 444 U.S. 926 (1979) (*Cooper II*), the court found a waiver and emphasized that the Navy distributed the Aircraft Accident Report in that case to unauthorized personnel including the aircraft manufacturer. *Id.* at 486. The Court of Appeals for the Fifth Circuit quoted the trial court with approval:

"Whether it results from negligence, or from voluntary and knowing acts on the part of Navy personnel, the fact remains that the release of these reports to persons other than those authorized by Navy regulations can be traced directly to the Department of the Navy . . . . Thus, the Navy did not adhere to its own regulations pertaining to the dissemination of information contained in these [Aircraft Accident Reports] and should now be held to have waived the exemption which it might have had under the Freedom of Information Act insofar as this particular report is concerned. The Navy Department simply cannot permit these reports to be available to some people, who are not authorized under its own regulations . . . and then deny the same privilege to others." *Id.* at 485-86. *Accord*, *Shermco Industries v. Secretary of the Air Force*, 613 F.2d 1314, 1320 (5th Cir. 1980); *Education Instruction, Inc. v. Department of Housing and Urban Development*, 471 F. Supp. 1074, 1081 (D. Mass. 1979), *aff'd*, 649 F.2d 4 (1st Cir. 1981). *But cf.* *Medina-Hincapie v. Department of State*, 700 F.2d 737, 742 n.20 (D.C. Cir. 1983) (holding that a U.S. State Department "leak" does not waive Exemption 3).

If this Court decides that a privilege and exemption should apply in this case, the release of documents at Findley's deposition constituted a waiver. In fairness, the factual data contained in the released documents should be fully and accurately disclosed to all parties and counsel in this litigation.

IV.

**IN ANY EVENT, DISCLOSURE IS REQUIRED TO SATISFY THE TRUTH-SEEKING FUNCTION OF THE COURT.**

As discussed earlier, Air Force Regulation 127-4 requires that military safety investigators report directly to commanders at the various Air Force levels. A.F. Reg. 127-4, paras. 9 and 13-16 (Jan. 1, 1973). In addition, Air Force personnel are duty-bound to know their regulations. As a result, those involved in air crash investigations are quite aware of these mandated communications between command levels. In fact, by regulation, those accused of fault are given an opportunity to rebut the findings of the Accident Investigation Board. A.F. Reg. 127-4, para. 23 (Jan. 1, 1973). Reports and rebuttals are forwarded through channels to major command headquarters. *Id.* It is submitted therefore that promises of confidentiality do not affect decisions by military personnel as to the content of their testimony. Service personnel realize that their reputation and career, and that of their friends, are potentially at stake, and testify accordingly.

The Air Force safety investigation is, moreover, quite comprehensive. Most importantly, the interrogation of witnesses quickly follows an aircraft accident so as to minimize the opportunity for personnel to forget or fabricate details. See, e.g., A.F. Reg. 127-4, paras. 5 and 6 (Jan. 1, 1973). As a result, the petitioner in this case errs in concluding that disclosure of the witness statements "made to military safety investigators is unlikely to promote open government,

an informed citizenry, or any other beneficial purpose." Brief for Petitioner at 33. Those statements are the freshest and most accurate accounts of the aircraft accident available.

In contrast, the key depositions in the underlying case took place three years after the accident. In addition, the events leading to the plaintiff's injury occurred more than ten years ago. The testimony at trial will suffer accordingly. As a result, disclosure of the statements at issue, despite petitioner's contentions, will clearly promote ascertaining the truth, prevent government abrogation of its responsibilities, and inform private citizens of their rights and liabilities with respect to the underlying aircraft accident.

This Court has noted that "[d]iscovery for litigation purposes is not an *expressly* indicated purpose of the [Freedom of Information] Act." *The Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 25 (1974) (emphasis added). Justice Douglas pointed out in dissent, however, that the FOIA:

"had as one of its purposes 'discovery for litigation purposes.' Congress was concerned not only with the press and the general public when it lifted the veil of secrecy surrounding federal agencies but also with litigants. According to the Senate Report, the new FOIA was designed in part 'to prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way in which to discover it.' S.Rep. No. 813, 89th Cong. 1st Sess. 7." *The Renegotiation Board v. Bannerkraft Clothing Co.*, *supra*, at 30 (Douglas, J., dissenting).

In any event, this Court has repeatedly held that "[t]he basic purpose of a trial is the determination of truth." *Tehan v. United States*, 382 U.S. 406, 460, *reh. denied*, 383 U.S.

931 (1966). *Accord, United States v. Havens*, 446 U.S. 620, 626, *reh. denied*, 448 U.S. 911 (1980) ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.").

In the current case, there are clear indications that witnesses Hoover (the pilot-plaintiff) and Dickson (the Air Force parachute rigger) testified to facts during the Air Force Safety Investigation that conflict directly with their subsequent testimony in other forums. Their earlier statements concerned the nature and cause of the accident, and tend to reveal the truth directly bearing on the rights and liabilities in this litigation.

A key issue in the related case below involves a missing speed connector link that Amicus allegedly manufactured. The link was a connecting element in the parachute apparatus that purportedly failed during Hoover's ejection. Following his parachute landing, the right rear connector link was missing from Hoover's equipment and was never found. Whether Airman Dickson properly replaced the link during his modification and re-pack of Hoover's parachute remains a critical question in the underlying litigation. As a direct result, the liability of Amicus in this case may hinge completely on the truthful testimony of Airman Dickson. That testimony exists in the records of the Air Force Safety Investigation Board.

Also, Hoover's deposition testimony about events leading to his injury directly conflicts with that given to the Safety Investigation Board (as reflected in the documents temporarily released by the Air Force). At his deposition, Hoover stated that following ejection, he executed a normal parachute landing fall upon impacting the ground. To the Air Force safety investigators, however, Hoover admitted that he raised his knees in a crouch prior to impact and landed on his survival kit which had failed to automatically deploy.

The truth of the matter bears on more than Hoover's credibility. The degree and proportionate share of liability among the individual defendants in this case turns directly on the truthful account of events prior to injury. How did Hoover's equipment function, or not function? Which items of equipment malfunctioned and how? What extraordinary steps was Hoover forced to take due to certain malfunctions as opposed to others? These are questions that can only be fairly answered with access to Hoover's fresh, unadulterated statements made to the Air Force safety investigators.

Finally, Amicus must emphasize that the events leading to Hoover's injury happened more than ten years ago. Almost certainly, many of the military and civilian personnel involved have retired, moved elsewhere, or, perhaps, even died. Written records have been scattered, misplaced and destroyed. The evidence in this case is decidedly stale. In such a situation, conducting a fair and effective trial hinges dramatically on using the most accurate evidence available. That evidence, and the truth are found in the witness statements that the government wants to suppress. Amicus urges this Court to prevent that suppression of truth.

### CONCLUSION.

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Dated: December 1, 1983.

Respectfully submitted,

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## APPENDIX.

### **Air Force Regulation 127-4, January 1, 1973 (in pertinent part):**

**1. *Air Force Policy on Investigation and Reporting***

. . . . Each major commander will:

- a. Investigate and report each accident and incident.
- b. Maintain a followup system to make sure that all corrective action is taken.
- c. Require a personal report from the commander of each subordinate unit having an accident that causes death or serious casualties [sic] or extensive property damage. Included in this category are accidents that:
  - (1) Arouse widespread public interest;
  - (2) Cause an unfavorable public reaction toward the Air Force; or
  - (3) Result in lawsuits against the Government.

This personal report is in addition to all others required by this regulation. The frequency and severity of accidents will determine the extent of the personal contact.

- d. Accomplish courtesy reporting as outlined in AFM 127-2.

**2. *Administration of U.S.A.F. Accident/Incident Investigation and Reporting Program.*** The Deputy Inspector General for Inspection and Safety, HQ USAF, through the Directors of Aerospace and Nuclear Safety, administers the USAF Accident and Incident Investigation and Reporting Program. Within his area of responsibility, each director will:

- a. Administer this regulation.
- b. Analyze and evaluate each accident/incident and make sure it is properly reported and investigated.

- c. Initiate procedures, develop forms, and prescribe the nature and extent of investigations and reports.
- d. Keep on file the original copy of each USAF Accident/Incident Report and prepare analyses and statistical data for use in accident prevention.

\* \* \* \* \*

5. *First Military Personnel at Scene of Mishap.* The first military person reaching the scene, if the situation requires, will:

- a. Obtain necessary medical services or identification assistance, as required. (For mortuary services, see AFM 143-1.)
- b. Report by telephone or the most expeditious means all known facts to the nearest Air Force installation.
- c. Obtain names and addresses of all available witnesses (including the rank, SSAN, organization, and station of all military personnel) whose testimony may aid the investigation.
- d. Until relieved or otherwise instructed by competent authority, do what is necessary to make sure the wreckage is not moved or tampered with in any way.

\* \* \* \* \*

6. *Responsibilities of the Nearest Air Force Base Commander.* (Also consult AFM 335-1G.) As soon as he learns of an accident/incident on or near his base, the commander is responsible for:

- a. Emergency First Aid and Safety Action. He will:
  - (1) Furnish necessary firefighting, rescue, and medical facilities and other disaster control activities, as required;



\* \* \* \* \*

(6) Conduct investigations as required by AFM 112-1.

\* \* \* \* \*

9. *Who Is Responsible for Investigating an Accident or Incident:*

a. Investigating Major Commander. The major commander, with command responsibility for the unit that had the mishap is responsible for insuring that the accident/incident is investigated . . . . The responsible major commander may authorize a deviation from c below within his command, to expedite and insure a comprehensive and professional investigation. When the accident/incident is in a locality that prevents a prompt investigation by the responsible major commander, he may request another major commander to appoint an investigating commander who is nearer the scene of the occurrence; such an appointment will take place only with the mutual consent of the two major commanders concerned.

b. Investigating Commander. The commander who appoints the investigating board or officer or under whose jurisdiction the investigation is actually conducted is the investigating commander. He will:

- (1) Decide whether the investigation is to be conducted by one of his staff investigating officers or by an investigating board.
- (2) Insure that crash, preliminary, supplemental, and progress reports are submitted.

\* \* \* \* \*

- (4) Insure that all accident factors are investigated thoroughly and obtain technical assistance as

required . . . . He will seek the advice of his staff judge advocate on legal questions and will consult The Judge Advocate General, HQ USAF, if necessary; see paragraph 24.

- (5) Review the investigation proceedings, findings, recommendations, and actions; evaluate the formal accident/incident report to insure that it fulfills the purpose, intent, and requirements of the USAF accident prevention program.
  - (6) Forward the formal accident/incident report as required by this regulation (see section D). If more information is discovered after the formal report has been submitted, he will send it by letter to the same addressees. (This letter should include the names of persons whose subsequent deaths were the result of the accident.)
  - (7) Take corrective action required to prevent recurrence of the mishap. (Describe action taken in the correspondence forwarding the report.)
  - (8) Authorize the release of information to news media, relatives, and other agencies specified in paragraph 20.
- c. How to Decide Who Is the Investigating Commander. Formal responsibility is determined as follows:
- (1) If the accident involves aircraft, missiles or nuclear materials, the commander of the next echelon above the unit that had the accident normally is the investigating commander. However, in no instance will the investigating commander be lower than wing or equivalent

organizational level.

\* \* \* \* \*

- (3) If an aircraft mishap involves operators of two or more bases/organizations, their respective commanders will mutually determine which will be the investigating commander.

\* \* \* \* \*

### 13. *Brief Discussion of the Reporting System.*

a. Types of Reports. To insure that all interested activities are notified and kept abreast of developments of an investigation, the reports below are required as specified in attachments 3 through 7 for each type of accident and incident.

- (1) Telephone Report. When a serious accident or incident occurs, report immediately by telephone to the AF Operation Center. This is referred to as OPREP-3 report (see JCS Pub 6, Vol II and V).
- (2) Teletype Report (Crash, Preliminary, Supplemental and Progress). Submit these reports to notify all appropriate persons and officers that a mishap has occurred.

\* \* \* \* \*

- (4) Formal Report (See AFM 127-2). This report is the detailed record of the investigation and is submitted on the AF Forms 711 series. Attachment 9 specifies the forms and substantiating documents to submit for a formal report. This report is sent to the appropriate addressees (listed in attachments 3 through 7) who review the report for command and corrective actions.

\* \* \* \* \*

14. *Who Will Review the Formal Report.* Since the causes may include weather services and facilities, materiel failure or suspected design deficiency, human error, and other factors, the report must be reviewed by the responsible commands, action agencies, and personnel. The following will review each report:

- a. Each organization with command responsibility.
- b. Each command with technical responsibility.
- c. Each person who has been named responsible for the accident/incident, except persons involved in ground/explosives mishaps (see paragraph 23 for rebuttal procedures).

15. *Forwarding Reports.* The accident investigating board president or the investigating officer will send copies of these reports to the addressees (listed in attachments 3 through 7) within the assigned deadline. He will:

- a. Send the original (first copy of multilith not used) aircraft, missile or explosives accident report or formal incident report with a letter of transmittal to the Dir of Aerospace Safety; send nuclear accident/incident reports to the Dir of Nuclear Safety.

\* \* \* \* \*

16. *Review of Formal Reports by Commands and Appropriate Action.*

- a. Each headquarters to which aircraft, missile, major command, explosives or nuclear reports are forwarded for review (see attachments 3 through 7) will indorse them to the next higher headquarters or return them to the next lower echelon for additional information or investigation, within 12 work-days of their receipt.

- b. A commander who cannot meet this 12-day deadline will notify the appropriate intermediate and major commands and the Dir of Aerosp Safety (or Dir of Nuclear Safety, if nuclear) of the delay. He will explain the reason for the delay and tell when he expects to forward his indorsement.
- c. Each indorsing commander will state his concurrence or nonconcurrence with the report findings and with the corrective action taken or recommended by each subordinate indorsing commander.
- d. The major commander will retain the report (except for major ground reports) and, within the 12-day deadline, indorse the transmittal letter (AF Form 711a for major ground reports) to Dir of Aerosp Safety and/or Dir of Nuclear Safety stating:
  - (1) His concurrence or nonconcurrence with all recommendations resulting from the investigation, including those of each subordinate indorsing commander; and
  - (2) The corrective action taken within the major command, including action to forward the report to the appropriate agency for corrective action.

\* \* \* \* \*

19. *Purpose and Limitations on the Use of Accident and Incident Reports.* This paragraph does not apply to ground or explosives accident/incident reports.

- a. **Privileged Reports.** These reports and their attachments are prepared by, for, or at the direction of The Inspector General, USAF, and his deputies, directors and assistants and are, therefore, privileged documents. (The disposition of privileged documents will be as directed by AFM 12-50 and

AFR 205-1.) When destruction is authorized for unclassified reports, tear or otherwise deface documents in a manner that offers positive assurance against further access to the information.

- (1) Reports and investigations of the USAF accidents and incidents made under this regulation will be used only within the USAF to determine all factors contributing to the mishap for the sole purpose of taking corrective action in the interest of accident prevention (see paragraph 20).

\* \* \* \* \*

- (3) These Reports and their attachments will not be released to the Department of Justice, any United States attorney, or any other person for litigation purposes in any legal proceeding, civil or criminal, except as stated in (4) below. These prohibitions include any action by or against the United States . . . . This prohibition includes crash, preliminary, supplementary, and progress reports, formal reports on AF Form 711, and special accident/incident investigative reports prepared by the Dir of Aerospace Safety.
- (4) Notwithstanding the restrictions on use of these reports and their attachments and the prohibitions in this regulation against their release, factual material included in accident/incident reports, covering examination of wreckage, photographs, plotting charts, wreckage diagrams, maps, transcripts of air traffic communications, weather reports, maintenance records, crew qualifications, and like non-

personal evidence may be release [sic] as required by law or pursuant to court order or upon specific authorization of The Judge Advocate General after consultation with The Inspector General. Also, Federal law requires that an accused in a trial by court-martial will, upon proper court order, be furnished all statements sworn or unsworn in any form which have been given to any Federal agent, employee, investigating officer, or board by any witness who testifies against the accused.

\* \* \* \* \*

23. *Notifying Persons Found Responsible for an Aircraft, Missile, or Nuclear Accident/Incident:*

- a. **Military and Civilian Personnel Under Air Force Jurisdiction.** When the investigating board/officer or a reviewing commander (see note at end of para 16a(4)) names a person whose action or inaction it finds to have been a cause of the mishap, that person will be given an opportunity to submit a statement of rebuttal, or a statement declining rebuttal. Further, the person must be advised that paragraph 12c applies to statement of rebuttal and that the statement will become an attachment to the accident/incident report. If the person found responsible is:
  - (1) Attached/assigned to the organization that had the mishap, the investigating board/officer will offer him an opportunity to review the report and submit his rebuttal statement as above.
  - (2) Attached/assigned to another major command (other than the one that had the mishap), the investigating board/officer will send a copy

of the report to the person's immediate commander with a letter asking that commander to:

- (a) Notify the person and give him an opportunity to review the report.
- (b) Obtain the above rebuttal statement and return it (with a specified number of copies) to the investigating board/officer.
- (c) Forward one copy of the rebuttal statement with the report through channels to the major commander. (He will detach the report and indorse the rebuttal statement to the Dir of Aerospace/Nuclear Safety as appropriate, indicating any appropriate corrective action which has been taken.)



No. 82-1616-CFX  
Status: GRANTED

Title: United States/ Petitioner  
V.  
Weber Aircraft Corporation, et al.

Docketed:  
March 31, 1983

Court: United States Court of Appeals  
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Soinet, Jacques E., Galardi, Lawrence  
J.

Entry	Date	Note	Proceedings and Orders
1	Feb 19 1983		Application for extension of time to file petition and order granting same until April 1, 1983 (Rehnquist, February 23, 1983).
2	Mar 31 1983	G	Petition for writ of certiorari filed.
4	Apr 27 1983		Order extending time to file response to petition until May 31, 1983.
5	Jun 1 1983		DISTRIBUTED. June 16, 1983
6	Jun 3 1983	X	Brief of respondent Mills Manufacturing Corp. in opposition filed.
7	Jun 4 1983	X	Brief of respondent Weber Aircraft Corp. in opposition filed.
8	Jun 13 1983		Reply brief of petitioner filed.
10	Jun 20 1983		REDISTRIBUTED. June 23, 1983
11	Jun 27 1983		Petition GRANTED. *****
12	Aug 8 1983		Joint appendix filed.
14	Aug 10 1983		Order extending time to file response to petition until September 10, 1983.
15	Aug 25 1983		Record filed.
16	Aug 25 1983		Certified original record 2 C.A. proceedings, 3 volumes, received.
18	Sep 8 1983		Order further extending time to file response to petition until September 24, 1983.
19	Sep 24 1983		Brief of petitioner United States filed.
21	Oct 18 1983		Order extending time to file response to petition until December 2, 1983.
22	Nov 15 1983		Order further extending time to file response to petition until December 10, 1983.
23	Nov 23 1983		SET FOR ARGUMENT. Wednesday, January 11, 1984. (1st case)
24	Dec 6 1983		Brief amicus curiae of United States Forgemaster Corp. filed.
25	Dec 8 1983		CIRCULATED.
26	Dec 9 1983		Brief of respondent Weber Aircraft Corp. filed.
27	Dec 9 1983		Brief of respondent Mills Manufacturing Corp. filed.
28	Dec 9 1983		Brief amicus curiae of Inderjit Badhwar, et al. filed.
29	Dec 10 1983	X	Brief amicus curiae of Reporters Committee for Freedom of the Press, et al. filed.
30	Jan 4 1984	X	Reply brief of petitioner United States filed.
31	Jan 11 1984		ARGUED.